



**R E M A R K S**  
ON THE  
**P R I N C I P A L A C T S**  
OF THE  
**T H I R T E E N T H P A R L I A M E N T**  
O F  
**G R E A T B R I T A I N .**

By the AUTHOR of LETTERS concerning the  
Present State of POLAND.

*Gardons nous de ce respect humain, quand il s'agit des fautes  
publiques que le malheur des tems a arrachés à des corps re-  
spectables. On ne saurait trop les mettre au jour, ce sont des  
phares qui avertissent ces corps toujours subitans de ne plus  
se briser aux mêmes seuils.*

**V O L . I .**

Containing **R E M A R K S** on the **A C T S**  
relating to the **C O L O N I E S**,  
WITH  
**A P L A N O F R E C O N C I L I A T I O N .**

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**L O N D O N ,**  
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# C O N T E N T S.

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## P R E F A C E.

THE opposite and irreconcilable characters bestowed by different persons on the last parliament had long perplexed me. To the virulent effusions of maddening faction, to the abusive bead-roll of cant sentences echoed from inferior quarters, I paid little heed; but when grave magistrates, in addresses to the throne; when famous orators, within the walls of the house itself, represented parliament as the betrayer, not the guardian of the rights of the people; when others as loudly exalted its wisdom, firmness, and independence; it then became at once more interesting, and more difficult to decide what was the character that parliament deserved.



The interest which every citizen must take in such a question was much increased by the very first appearances of the election that succeeded. At first sight it appeared that a large majority of the same members would be returned to the next parliament. If the thirteenth parliament then deserved one half of the reproaches with which it had been so plentifully laden, we might expect before the end of the fourteenth to be in that sort of state, in which it would behove every prudent and every honest citizen to lay aside all confidence in *electors* or *elected*, and take the charge of his security into his own hands.

To put my mind at ease, I determined to sit down and examine coolly the principal transactions of that assembly; and, without borrowing my opinion either from its lifted advocates, or defamers, form my judgment from its own records.

Of

## P R E F A C E.

v

Of the result of that examination, what is here, with all due deference, submitted to the public, is a part. In submitting it, however, I would wish to obviate two objections to which this attempt may seem at first sight liable. Some will censure it as *indecent*; for what can be more indecent, if we may believe a celebrated commentator\*, than for a private man to pass judgment on the acts of the legislature?—Others may slight it as *unfinished*.

In answer to the first charge, that of indecency, I would ask whether it be indecent to examine, to reflect? Now every man who reflects at all, must either approve, or disapprove, or suspend his judgment. If he approves, it is because the thing approved of is conformable to

\* Blackstone, Com. iv. 50. He is there speaking of a crime being of a much *grosser* nature, than another which he there mentions, “ since “ it carries with it the utmost *indecenty*, arrogance, “ and ingratitude. Indecency, by setting up private judgment in opposition to public authority.”

his own ideas : if he disapproves, it is because it is repugnant to his own ideas :— if he keeps himself in suspense, it is because it is partly conformable, and partly repugnant. There appears to me to be no more indecency in one of these operations than in another. If it be thought arrogant to express that opinion, I have only to say, that even in the most despotic governments it is allowed to speak freely of *deceased sovereigns*.—In France it is permitted ; in Egypt it was ordained. In this country, which some are pleased to call *free*, though not pleased, we find, with the only means by which it can be kept so ;—in this country a dissolved parliament is a deceased sovereign.—In Egypt, a despotic government, the custom of pronouncing orations at the embalming of their kings, was established as a means of inciting the reigning prince to reform the errors, supply the defects, and perfect the good designs of his predecessor.—Let these Remarks be considered in the same light.—  
Should

# P R E F A C E vii

Should the end proposed by them be in any degree attained, I shall have the merit of having served my country.—Should it totally fail, there is no demerit in the endeavour.

The motive I can be sure of: it is of the purest kind;—the wish of doing good;—unconnected with any party; too proud to be dependent on any: of too little consequence to be sought by any, I speak, but as I feel.—Wherever I think parliament has acted as the faithful guardian of our rights and liberties, I shall gratefully applaud:—where I think it has sacrificed them,—I shall as freely censure. For this I plead my motto in excuse.

To the second charge, that of offering but a part of a work to the public, I can only say, that *this* part is all that is *now* ready:—that it takes in the whole of the particular subject it treats of; and that this subject would form a *whole* of itself:—it is independent of, and but accidentally connected with any other:

—if this part is tolerably well executed, I shall be pardoned for sending it out alone;  
—if it be ill executed, the public I am sure will forgive me for not having troubled them with more.

I had another reason for not retaining this part till the whole was finished. —The subject of these remarks is now before the legislature. If ever therefore “my poor opinion” \* can be worth attending to, it is now.

I have only to add, that the objects of the legislature in the acts here examined, were some of the most difficult that ever came before this, or indeed any parliament. —It was therefore natural, that the acts themselves should be liable to the greatest objections. In other instances, I believe, it will be found, that we owe to it more beneficial acts than to any other parliament from the revolution to this hour.

\* I believe this *phrase* is borrowed from a famous orator. —But I may venture to say, that we attach very different ideas to the same signs.

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T H E  
D E S I G N.

**T**HE object of the acts here considered was to secure the dependence of the colonies upon the mother-country: a more important one has seldom come before a parliament; few in which greater, or more complicated interests were involved: "most certainly it called for the whole wisdom of the wisest among them \*."

A subject in which not only the general interests of the state, but the particular interests of so many individuals are so deeply concerned, must have produced many appeals to the public. Every man thought himself at liberty, some thought themselves engaged to give their opinions; much novelty, therefore, will not be expected.

My chief aim will be, to collect the various arguments as they lie scattered in different writers, to reduce them each to its pro-

\* Mr. Burke's Speech to the Electors of Bristol.



## x THE DESIGN.

per class, to present them to the reader in that point of view, in which alone they are applicable to the questions we are to examine.

In the discussion of these questions we shall reap little benefit from the dogmatic tone of general assertion, from the ingenuity of metaphor, or from the pompous display of "those gratuitous and acknowledged truths, which being generally received, are little doubted, and being little doubted have been rarely proved \*." To many of the latter class one general answer would suffice. "To be prejudiced is always to be weak †."

What avails it to tell us, that "a colony is to the mother-country as a member to the body, deriving its action and its strength from the general principle of vitality ‡. The colonists may smile perhaps at the pomp with which the hackneyed metaphor is reproduced; but they will add, "If you think us incurably tainted, submit us to amputation, you will find we have a principle of vitality within ourselves; we shall not perish like a putrid limb."

\* See Taxation no Tyranny, p. 1.

† See *ibid.* p. 3.

‡ See *ib.* p. 28.

What

What avails it to tell us, that "the just, wise, and necessary constitutional superiority of Great Britain over her colonies should be maintained unimpaired, and undiminished \*?" But *one* American has yet denied the position †.

What avails it to tell us, that the superiority of Great Britain over her colonies is not to annihilate the liberties of the Americans, is not "to put them in a situation not becoming a freeman \*?" These truths, what courtier is *bold* enough to dispute?

If you mean to instruct us, go one step farther, teach us to apply each our own maxim to our own case: define this constitutional superiority of Great Britain: teach us to reconcile British superiority with American liberty \*. This is not a question of the schools, to be decided by random maxims, or apophthegms of the sages.

What avails it to cite detached unconnected opinions from writers on our laws? This is not a question before a common court of justice, acknowledged to be com-

\* Mr. Burke's Speech to the Electors of Bristol.

† Dr. Franklin, as cited by Dr. Tucker, but it is since said the performance which the dean refers to is not Dr. Franklin's.

potent by both the contending parties. On this question the opinions of judges and council have no doubt their weight; but will the Americans allow them to be decisive? If they would, with all due deference to so formidable a body, the writings of lawyers are like two-edged weapons, they cut at friend and foe. Whoever is acquainted with them will be ready enough to acknowledge, that there is not in the world a more fluctuating, we may boldly say, a more fallacious guide.

There is no maxim so unconstitutional, no two maxims so contradictory, that I would not undertake to prove from the writings or opinions of some of them\*.

It

\* Thus Lord Coke is cited by the author of "the Appeal to Justice, and the interest of the people of Great Britain in the present Disputes with America." Coke had said, "that it is against the franchise of the land for freemen to be taxed but by their *own consent*." This position was not true in his time: it is still less so in ours: it would disfranchise three-fourths of the inhabitants of Great Britain: three-fourths of us neither are taxers, nor give our voice in the choice of taxers, nor even our consent to the nomination of those who do chuse them. Our security is not that our *consent* is given to every tax, but that our interests and those of the *taxers* are so involved, that in general *we* cannot be taxed without *their* being taxed with us.

It may serve the purpose of party but not of truth, to mutilate or to misapply more respectable authorities\*.

Hard

The same writer lays great stress on the opinions of the judges in the time of Henry VI. and Richard III. respecting the power of taxing Ireland. A courtier perhaps might think him answered, by citing the opinions of the judges in the time of Charles I. respecting ship-money. He cites from Bracton, "*Auxilia fiunt de gratia et non de jure, cum dependant ex gratia tenantium, et non ad voluntatem dominorum.*" A maxim as plainly contradicted by fact as that other of Lord Coke. Few men I believe pay taxes out of mere *good-will*. To furnish means for the defence of the community against foreign foes, and for the security of each man's property against the fraud or violence of domestic invaders—whatever political fanaticism may tell us, is a matter of *strict* duty: if Bracton's authority is all-conclusive, what will this writer say to another quotation? I hope, and I believe it will, be less agreeable to *his* taste. "*Rex est vicarius, et minister Dei in terrâ, omnis quidem sub eo est, et ipse sub nullo nisi tantum sub Deo.*" I mention this only to shew the absurdity of relying on general and detached maxims laid down by our lawyers.

\* The author of the Appeal has prefixed to his work a resolution of the house of commons: he cites it thus: "Resolved, That the ancient and undoubted rights of every free man are, that he hath a full and absolute property in his goods and estate, and cannot be taxed but by common consent." The resolution stands thus upon the Journals:—"Resolved upon the question, that the ancient and undoubted right of every freeman

Hard words may serve to shew a man's spleen, but they serve little to fortify his opinion. Virulent and abusive language \* may carry off a fit of passion, but will neither persuade nor convince.

The only method of determining fairly on the conduct of the late parliament in this important business, will be to enquire

"freeman is, that he hath a full and absolute property  
"in his goods and estate, and that no tax, tallage, loan,  
"benevolence, or other like charge, ought to be com-  
"manded or levied by the king, or any of his ministers,  
"without common assent by act of parliament." See  
Journals of the House of Commons, Vol. I. p. 878.

The reader sees, that this resolution is levelled against the unconstitutional power assumed by the crown. It was never intended to define the power of parliament. To mutilate or misapply citations of such authority, in a question of such magnitude, is at once impolitic and unfair.

\* The author of the Appeal above cited, talks (p. 37).  
"of the ideots who are conducting our present mea-  
"sures." Of Lord North's snuffing up the incense of  
adulation "in the very sincerity of his vanity and  
"folly." One feels pain at meeting with these illi-  
beral phrases in a book, which does not otherwise want  
merit. The writers on the ministerial side have kept  
pace with their antagonists in this application of abu-  
sive terms, &c. The phrases of "rebels," "babes of  
"grace," are by many of them dealt out with a very  
liberal hand. The author of "Taxation no Tyranny,"  
in his "terrific" style, talks of "airy bursts of malevo-  
"lence;" and advises us "to repel their arguments  
"with scorn rather than refute them by disputation."

I. As

I. *As to the point of Right.*

1. As to the *crown* alone, what is the power with which the constitution invests that *branch* of the legislature over countries conquered, or otherwise acquired?

2. As to the *whole body* of the legislature, whether its operations can be restrained by any acts of the aforementioned branch of it.

3. Again as to the whole body of the legislature, whether on the particular point of taxation there be any other principle in the constitution to restrain its operations?

II. *As to the point of fact.*

1. What were the privileges originally granted by the crown to the colonies?

2. What power preceding parliaments exercised over them.

When these questions are fairly discussed, and not before, we may venture to give our opinions.

III. *On the merits of the proceedings of the last parliament.*

1. Whether they were consistent with the spirit of the constitution.

2. Whether they were consistent with the dictates of sound policy.

To enter on the two last subjects of enquiry before the other points are fully settled, would at least be preposterous. It would be to begin where we ought to end.

If

I. As



If the power vested in the crown, over conquered or acquired countries, be circumscribed within certain bounds, by certain acknowledged rules, all acts done in the exercise of that power, must be measured by those rules, on their conformity to which their validity will depend.

If the acts done in the exercise of that power do not bind or restrain parliament, it is in vain to cite those acts. On this supposition charters are useless parchments,—because *ineffective*.

If there be any principle in our constitution, by which the Americans can claim an exemption from parliamentary taxation, then too charters will be found but useless parchments, because *unnecessary*.

If there be no such principle, then allowing to charters their utmost force, the colonists can plead no exemption from thence, till they have shewn it to be there either specified, or of necessity implied.

If different interpretations be put on the same grants by the contending parties, we must then appeal to usage to decide between them.

If the proceedings of the last parliament be questioned, we must exactly know the situation in which the preceding parliament had left it.



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## P A R T I.

### ENQUIRY INTO THE MATTER OF RIGHT.

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#### S E C T. I.

*What is the power with which the Consti-  
tution invests the Crown over countries  
conquered or otherwise acquired?*

**I**N examining this question, some pro-  
positions may perhaps be advanced,  
which are allowed on all hands: these,  
if any such there be, require no proof;  
it will be sufficient to state them. If dis-  
puted propositions are advanced, we must  
appeal to history, and precedents, in sup-  
port of them. History and precedents  
are *here* the most unexceptionable proofs.

B If

If the king has for a long succession of years invariably exercised certain powers over conquered, or acquired countries; if the English or British parliament has looked on, and allowed the exercise of these powers; such a tacit consent is equivalent to a positive institution; is a constant act of recognition. Precedents then, if uncontradicted by precedents of an opposite nature, are conclusive.

Let us begin with the case of conquered countries. No man disputes, that the constitution has vested in the king the power of making war, and making peace. He may grant what terms of capitulation he pleases: he may make what articles of peace he sees fit. This is allowed on all hands.

Terms of capitulation, articles of peace, ought to be understood in their plain and natural sense; ought to be strictly, and religiously observed. This too is allowed on all hands.

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Should the king grant improper terms of capitulation, should he sign improper articles of peace, the consequences *might* be fatal to himself: they *ought* to be so to his ministers, and advisers. But still the people capitulating, or treating, ought either to be maintained in the rights and privileges which had been granted them, or restored to the situation they were in at the time of capitulating or treating.

The same, I apprehend, holds true of acquired countries—of settlements, made either in countries vacant, as was the case of Barbadoes; or in countries purchased of, or ceded by the original inhabitants, as was the case of Ireland, and of our colonies in North America.

It appears, that the constitution has vested in the king the power of granting such forms of government to the founders of new settlements, as he judges to be best for the purposes of the settlements; in the same manner as it invests him with the power of granting such

terms of capitulation, such articles of peace to a conquered country, as he judges best for the security of the conquest.

Let us consider the case of Ireland.

"An odious fugitive (says Dr. Leland\*)  
"driven from his province by faction  
"and revenge, gains a few adventurers  
"in Wales, whom youthful valour, or  
"distress of fortune, led into Ireland."  
These adventurers embarked under the sanction of a general licence from Henry II. king of England. They assisted Dermot, king of Leinster, in the reduction of his revolted subjects. He, in return for this aid, invested them with divers towns and districts. This I think can hardly be called a *conquest*; it was a *settlement* granted by a *friend*, and not a conquest made upon an *enemy*.

Soon afterwards Henry went over in person to Ireland. He claimed the whole of the island. His claim was founded on

\* History of Ireland, vol. i. p. 21.

a grant

a grant from the late pope Adrian. The adventurers resigned into the hands of Henry the districts ceded to them by Dermot. To the English settlers in these districts, Henry, by his *own* authority, without the intervention of the English parliament, gave the full enjoyment of the English government *there*, in their new settlements. With the native chieftains, who acknowledged themselves his tributaries, he made a solemn compact\*.

He granted, by his *own* authority, the city of Dublin to the inhabitants of Bristol, with all the liberties and free customs, in this new settlement, which they had enjoyed at Bristol.

By his *own* authority he granted the town of Waterford to the Ostmen, with the like enjoyment of the laws of England.

The privileges of the English law, so much at least as consisted in the enjoy-

\* See Leland's History of Ireland, vol. i. p. 77, et seq.



ment *there* in Ireland of the same constitution as the English subjects enjoyed in England, were successively granted to the principal of the Irish lords, as they submitted to the king.

Some time afterward we see Henry, of his own mere motion, and power, granting the lordship of Ireland to his son John. It was done (says the historian \*) in “*consilio generali: coram episcopis, et principibus terræ.*” But it does not appear, according to Dr. Leland, that they acted as advisers and counsellors, much less as co-legislators; they were purely and simply *witnesses* to the act. Their presence was required, not to add *authority*, but mere *publicity* to the grant. In consequence of this grant, John ever afterwards, during the lives of his father and brother, and before his accession to the throne of England, used the title of *lord of Ireland*.

\* See Leland's History of Ireland, vol. i. p. 129, et seq.

At the same time Henry, of his own authority, made other grants:— of the kingdom of Cork, as it was called, to Milo de Cogan and Robert Fitz-Stephens; of the kingdom of Limerick to Herebert Fitz-Herebert; and so of other districts to others, to hold of *the king, and of his son John*.

In the year 1210, John, now king of England, arrives in Ireland. He establishes courts of judicature in Dublin. He divides his acquisitions into different counties; appoints to each its sheriffs and officers: and, assisted by lawyers of both kingdoms, causes a regular code and charter of laws, upon the model of those in England, to be drawn up, and established for the common benefit of the land. This charter was confirmed by the *king's* seal, was deposited in the Exchequer of Dublin, for the direction of the judges, and the information of all his subjects. All this, it seems, was done by his own

authority; without asking the advice, or consent of his parliament \*.

Henry the third had no sooner renewed and confirmed the Great Charter, granted by John his father to his English subjects, than he transmitted a duplicate of it to Ireland for the benefit of his Irish subjects, "with those alterations only (says Dr. Leland†) which the local necessities of Ireland required."

This too was done by the authority of the king *alone*. By his *own* authority Henry extended some of the provisions ‡, if not all, contained in the statute (or as it should be called the ordinance§) of Merton, to his land of Ireland.

Edward the first, by his own authority, after conference and deliberation, not with his *parliament*, but with his *council* ||, ex-

\* See Leland's History, vol. i. Also Vaughan's Reports, *Craw v. Ramfay*.

† Vol. i. p. 200.

‡ *Ib.* p. 236.

§ See Barrington on this statute.

|| See Leland, vol. i. p. 244.

tended the benefit of the English laws to other settlements within the king's land, or as the patent expresses it, "belonging to the community of Ireland."

It does not appear that any consent of the English parliament was taken for the passing of this patent; but there is extant an instruction to the governor, directing him to take the consent "of the people of *that land* (the part of Ireland within the English pale) or at least of the prelates and nobles."

Lastly, by an ordinance of Edward III. an Irish parliament was instituted, and "regulated according to the institution of the parliament of England\*." "By this parliament (says the royal ordinance) we will that our affairs, and those of our land, be, agreeably to justice, law, custom and reason, faithfully treated, debated, discussed, and finally *determined*."

\* See Coke, Inst. IV.—Leland, vol. i. p. 313.

This

This ordinance completely established that form of government in Ireland, which had been promised to the first settlers. And from the time of the first promise, during all the successive gradations to this its complete establishment, the king acted *alone*, by his own authority, without any participation with, or opposition from the English parliament. Nor is there any marks to shew that the English parliament considered any of these different grants of their successive kings, otherwise than as legal. Nor was any objection made to this last ordinance; or to the power thereby conveyed to this new erected parliament. Yet a trying occasion soon presented itself. The English had often and liberally contributed to support the king in his pursuits in Ireland. They at last grew uneasy under this burthen. But how did they conduct themselves? Under the pressure of this uneasiness what measures did the English parliament pursue? They expressed their uneasiness; they

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they remonstrated against supporting this burthen; they solicited the king \* to make a strict enquiry into the deficiencies of the royal revenues in that realm; but they did not venture either to call the supposed delinquents to account, or to supply the deficiencies by assessing any levy, by their own authority, on the subjects of Ireland.

Edward on his part did not apply to his English parliament to compel his Irish subjects to contribute their quota to the support of their own government. He summoned an *Irish* parliament to meet him in *England*.—The summons was obeyed, but not without reluctance; but not without a saving of their rights; but not without declaring this to be an act of *favour*, the voluntary effect of their reverence to the king.

These are the several acts exercised by the kings of England *alone*, over the Irish nation, from the settlement of the first colony to the full establishment of the Irish

\* A. D. 1376.

parliament. I have been the more particular in stating them, as apprehending that of all the possessions acquired by England, no other was acquired in a manner so much resembling the mode of our acquisitions in North America. Ireland can no more be called a *conquest* than North America. Ireland was a *colony*. The first settlements in America were yielded by the inhabitants to a set of adventurers, subjects to the crown of England: the first settlements in Ireland were yielded by the lawful proprietor, to a set of adventurers subjects to the crown of England. The settlements in America were granted to the settlers as already belonging to the king: those in Ireland were yielded by the settlers to the king, and regranted by him. Certain conditions were granted to the first adventurers in America; certain conditions were granted to the first adventurers in Ireland. The settlements in America were extended; partly by driving out the natives,



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## Sect. I. TO THE COLONIES. 13

tives, partly by compacts with the natives.  
—So were the settlements in Ireland.

I know of no law, or received maxim, by which the power of the crown has been in this instance abridged. And therefore whatever power the king could constitutionally exert over Ireland, the same he could exert over America. Whatever rights he could constitutionally grant to Ireland, the same he could grant to America. I do not now mean to push the parallel farther. The present question is not whether he *did* actually grant the *same* privileges to the one as to the other. That question will meet us in its proper place. What I contend for now is only this:— That the terms on which the king got possession of America, were similar to the terms on which he got possession of Ireland; that therefore if he had a constitutional right of conveying certain powers, and granting certain exemptions to the settlers in Ireland, he had the same constitutional right of conveying certain powers, and

and granting certain exemptions, to the settlers in America \*.

\* The parallel between Ireland and our American colonies has since been urged, and carried much farther by two opposite parties. The one said, that Ireland was an example of a subordinate state enjoying the full exclusive power of taxation, and internal legislation.—“No man (it was said) would pretend that we had a right to tax Ireland. Those who attempted it, contradicted themselves by allowing it was a right which we *ought* not to exercise; which we *could* not exercise.”—The opposite party allowed the parallel between Ireland and America, but maintained our right of taxing Ireland; still allowing *that* right to be unexercisable. Had the gentleman, who advanced this doctrine, taken the pains of defining what he meant by *right*, he would have found it difficult to maintain his proposition. A third party urged, that Ireland and America should never be compared together. His reasons were somewhat singular:—“Ireland (says he) has *one* parliament: America has *many*. Ireland provides for its own civil government: the civil government of America is, in part at least, in great part, supported by Great Britain. Ireland does more: it gives many thousand a year toward the military establishment of Great Britain: nay, it *subsidises* Great Britain; large sums are given in *pensions*.” The latter

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## Sect. I. TO THE COLONIES.

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If from Ireland we turn our eyes to *Wales*, we shall see the king exerting the same power.

part of the argument was what logicians call—"argumentum ad hominem."—His auditors, many of them, felt the force of it. The nation at large might wish perhaps that, in this respect, Ireland did *less*. To give pensions may be of service to a *minister*, of great comfort to a *certain* class of men, but I fear has done little good to the *people* of Great Britain. The rest of the argument has more of *show* than of reality.—"Ireland has one parliament, and America many."—By what rule of logic did this noble orator confound all the *different* provinces of America under the one general title of *America*? "Ireland has one parliament; (says Massachusetts Bay) and so have we;" each province may say the same: it was a dangerous idea to hold forth. Too soon perhaps all the provinces, disunited by force from the mother country, may form a band of union between themselves: they may then have *one* parliament. Ireland did not always provide for its own civil government: did not always contribute so liberally to the military and civil establishments of England. America thinks you are pressing her too warmly to pay her contributions; and truly many an honest Englishman may wish her not to be too forward in *subsidising*. We have subsidies enough, and to spare, for every warrantable purpose of government.

"What

“What is called the statute of Wales (12 Edward I. A. D. 1284.) says Mr. Barrington, is certainly no more than regulations made by the king in *council* for the government of Wales \*.”

This act of the king appears to have been made upon the fullest information. Some of the laws and customs, which prevailed in Wales before the conquests of Edward, are retained; others altered; others entirely abolished.

The preamble to the ordinance speaks of Wales as of a fief of the crown.—Edward knew it was a conquest—“And as conqueror (says Mr. Barrington) had a right to make use of his own words in the preamble to his own act.”—Had it been a fief, this ordinance would have been illegal.—“For he never pretended (says lord

\* This distinction was lately quoted, and approved in the very masterly speech of Lord Mansfield, made on pronouncing judgment against the claim of the crown to the right of taxing the Grenadas.

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Mansfield) "that he could make laws to  
"bind any *part of the realm*, without the  
"assent of parliament."

Berwick was a conquered district.—Edward the first, in whose reign it was conquered, by his own authority, confirmed to it the laws and usages, by which it had been governed before its reduction.—This charter was confirmed, or renewed, or extended by different kings, from Edward to the time of James, when Berwick was incorporated into the kingdom of England.

New York was conquered from the Dutch. Charles II. granted it to the duke of York, to hold of the crown. The form of its constitution, and political government, was entirely changed, and a new one prescribed by the king's letters patent.

Jamaica, at the time of the Restoration, had lost all its Spanish inhabitants.—Charles invited new settlers by proclamation; he promised them protection; he granted them lands:—he appointed the constitution, and political government of the island:—first

a governor and council; then a governor, council, and assembly.

Nor was this power of the king over conquered, or acquired countries, either disputed by the nation, or relinquished by the crown even after the Revolution.

At the time of the Revolution the charter of the New Englanders stood vacated by a judgment of the court of king's bench. They petitioned king William for the renewal of it: whilst the petition was yet under consideration, the king enquired "whether, without breach of law, *he* might appoint a governor over New England?" To which the lord chief *justice*, and other lords of the council, answered, "That (whatever might be the *merits* of the cause) inasmuch as the charter of New England stood vacated by a judgment against them, it was in the *king's power* to put them under what form of government *he* thought best for them.\*"

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\* See Neale's History of New-England, Vol. ii. p. 476.

The

In Gibraltar and Minorca the king not only prescribed the first form of government,

The reader will easily perceive, that the case of New England, in this instance, was, in many respects, different from that, either of a conquered or new settled country. Here were no enemies to yield themselves on certain conditions; no aliens, no subjects to expose themselves to expences and hazards on a promise of certain privileges.—They were subjects who (if the sentence against them was just) had violated their part of a compact:—and were therefore to receive from the sovereign power, such conditions as it was his pleasure to allow them. Yet even *here* the interference of parliament was not proposed; but it was said to be in the *king's* power to put them under what form of government *he* thought best for them. It is probable, that governor Barnard had this transaction in view, when, in the preface to his letters, he regrets it “as an unfortunate omission of policy, that at the Revolution the constitution of the government of America was not settled by *parliament*; and the rights of the imperial state over them acknowledged, with such regulations and limitations, as the several natures of them, upon constitutional principles and good policy, should require.”—And no doubt, the present only excepted, there never was a moment where the parliament could have taken on itself the power of regulating the forms of government in the different colonies, on such unexceptionable grounds.



vernment, but continues to this hour to exercise every act of legislation.

From all these precedents, *one* point is clear,—and that point is all we at present want :—that the constitution, as it stands at this hour, has invested the king with, and that the king has constantly exercised, the right of prescribing the form of the constitution and political government in all our conquests, and in all our settlements.

It is not fair to ask us for the precise written law, which invests him with this right.—The non-existence of such a written law, does not prove the non-existence of the right. Many of the rights of individuals depend upon custom ;—many of the rights of each of the branches of the legislature, depend likewise upon custom.

The cases of Gibraltar and Minorca are still different from the last, or indeed from any other, because the terms of capitulation were different : hence the powers of the king, in his subordinate legislative capacity, are more enlarged, more discretionary, than in our other colonies.

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SECT. I. TO THE COLONIES. 21

In this case the custom is unvaried. uncon-  
tradicted by any opposite precedent \*.

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it; and where is the difference between  
the *express* will, and a permissive will, of  
parliament, thus circumstanced; where the  
right has been so long exercised on one  
side, and acquiesced in on the other? Could  
greater, or other expectations, have been  
raised in the colonies by a positive than by  
this tacit declaration of the acquiescence of  
parliament? Would it not be as unjust to  
destroy the expectations raised by this tacit,  
as the expectations raised by any positive  
declaration?

The parliament, no doubt, might pre-  
scribe bounds to the exercise of this right  
in the king as to future conquests or settle-

\* It is upon this very ground that the House of  
Commons defends its exclusive claim to the right  
of bringing in and framing all money-bills; and  
that the House of Lords defends its claim to the  
exercise of the judicial power. See Com. Journ.  
Vol. ix. p. 240, & seq.

ments ;—but as no bounds are hitherto set to it, the power he exercises in prescribing forms of government to countries already conquered, or settled, is a power that seems warranted by the constitution.

For what do we mean by the *constitution* ? The question must be answered one time or other : as well may we answer it now as at any other time. Is it not that assemblage of institutions and customs which compose the general system, according to which the several powers in the state are distributed ?

I say customs as well as institutions ;—for, I repeat it again, it is upon custom that a great part of our political as well as of our civil government depends.

Not that we are hence to conclude, that the constitution is unalterable, or that any power in it is not liable to be put under, or restrained by, such other controuls and checks, as the wisdom of the present or future parliaments may adopt.

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Part I.

SECT. I. TO THE COLONIES. 23

The Americans have indeed discovered, —“ that in all free states the constitution “ is *fixed* ;” —that is, as the sequel explains it, *unalterable* : —“ the supreme legislative “ power of the state (they tell us) derives “ its authority from the constitution :” — they then ask us with an air of triumph, — “ If that power can overleap the bounds “ of the constitution, without subverting “ its own foundation \* ?”

I really do not know what these gentlemen mean by the constitution ; —for after all my researches, I never could find out the *immutable laws* of nature, in which they are so conversant ; and to which they refer us, as the proper standard by which to try the validity of acts of parliament. But if the constitution means, as I suppose it to mean, the assemblage of institutions and customs, by which the different powers in the state are distributed ; then, so far is

\* See Letter from the representative of Massachusetts Bay to Lord Camden, dated January 29, 1768, in The true Sentiments of America.

the legislative power from deriving all its authority from the constitution, that the constitution itself is in great part created by the legislative power;—then it is not true, that the constitution is so fixed, as never to be changed.

Most certainly the English constitution has not always been *fixed*. It often has been changed. It has been changed by parliament.—To these changes we owe our present liberty. Suppose a greater degree of liberty to be possible, is the same authority incompetent to make these changes, by which so desirable an object may be attained?

No doubt the English constitution is more fixed, that is, less liable to change, than the constitution of any other country, ancient or modern.—No doubt this is a very eminent advantage.—But whence arises this advantage? From the *division*, not from the *impotence*, of the legislative power; from the difficulty of uniting the different branches in any scheme of alteration,

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ration, not from their inability to effect alterations when they are united. Let them be once united, and you may say of them as truly as of any other legislature, "Elle change la constitution comme " Dieu crea la lumiere \*."

In this instance therefore, as well as in any other, parliament may change the constitution, by abridging or controlling the power of the king. But till it is abridged or controlled, the power itself and the exercise of it are surely constitutional.

\* See Constitution d'Angleterre, chap. xii.

SECT.

## S E C T. II.

*Can the operations of the whole body of the legislature be restrained by any act of the Crown?*

**T**O answer this question it will be necessary to state, and distinguish, the several capacities in which the king may be considered as acting.

The king gives his assent to a bill proposed to him by the two houses of parliament. The bill becomes a *law*. That is, a command concerning *sorts* of actions; addressed either to *all* the subjects of the realm in general, or to *sorts* of subjects. Here the king acts in his *supreme legislative* capacity. It is *legislative*, for the power of legislation is the power of issuing *commands* concerning *sorts* of actions. It is *supreme*, because it is derived from, dependent on, no other power.

No act of the king in this capacity can be applied to the present question. He  
acts



acts here as a constituent part of parliament. His consent to a bill is not so much the exercise of any positive power, as the non-exercise of a negative power. The initiative, that is, the power of putting the legislative in motion, is the function of the other constituent parts of parliament. To the king is reserved only the tribunitial power, the power of negation, of rejecting what he does not approve\*.

The king issues a proclamation. This too *may* be a command concerning *sorts* of actions, addressed to *sorts* of persons. Such a command is an act of legislation. Therefore here too the king acts in a legislative capacity. The power he exercises here is called a power of *subordinate* legislation†. For though the command

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\* See Constitution de l'Angleterre, passim

† I call this a power of *subordinate legislation* in compliance with custom. I would rather wish to call it a power of *discretionary execution*. For tho' indeed these are commands concerning *sorts* of actions, and addressed to *sorts* of persons, and so have one

be concerning *sorts* of actions, and addressed to *sorts* of persons, yet these sorts of actions are comprised in a more general sort, concerning which a command has been issued by that legislative power, which is called the *supreme*.

The circumstances under which, and the sorts of persons to whom these commands of the subordinate legislation are to be addressed, are specially pointed out by the supreme legislation. In a word,

*one* property of acts of legislation; yet this power wants that independence which I have been always accustomed to attach to the idea of legislation. I have always thought that there is much truth in that remark of a very sensible writer †: “The legislative power (says he) is that power in any state, which can make laws binding upon every other member of the state, not to be repealed or controlled by any other power but by itself only. Nothing short of this is legislation. Call any other power by what name you please, it is not legislative. It is subordinate to it, dependent upon it, delegated from it, created by it.”

† See the Defence of the Proceedings of the House of Commons in the Middlesex Election, printed in 1770, quarto, p. 31.

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the will of the subordinate legislation is directed as to its object, circumscribed as to its exercise, and controllable as to its effects, by the supreme legislation.

No act of the king in this capacity can be applied to the present question.

The king issues a command concerning *individual actions*, addressed to *individual persons*. That is, he commands individual persons, each comprised within a sort of persons, already designed by the legislature, to perform certain particular actions, each comprised within a sort of actions already commanded to be done by that sort of persons \*. Here the king acts in his executive capacity.

Clearly

\* For instance, it is a general command of the legislature, that all persons, importing certain merchandises from certain places, do pay such and such duties; and that the duties so paid be given by the receivers to other persons, who are to apply them to such and such purposes. These are all general commands, concerning sorts of actions to sorts of people. The legislature has no individual *person* in contemplation. John Stiles imports such merchandises from such places. The king, as executive

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Clearly no act of the king in this capacity can be applied to the present question.

The king grants a capitulation, or makes a treaty. In what capacity does he act then?

He does not act in his supreme legislative capacity. He never acts in that capacity but in conjunction with the other constituent parts of the parliament. No command is issued; nor are the persons, whom he has in contemplation in this ca-

ecutive magistrate, commands John Stiles to pay the duties; commands a particular officer to receive them, and to account for them to other persons: he commands those persons to apply them to their respective purposes. John Stiles refuses to obey this command: the king, as executive magistrate, commands his officers to seize the goods, sell them, &c. Here all these general commands are applied to individual actions and persons. The same reasoning may be applied to criminal cases. Where the chief executive magistrate commands the constable to arrest, the justice to commit, the goaler to receive, the judges and jury to try, and the sheriff to execute the sentence pronounced by the judges,

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capacity, the sorts of persons to whom, nor the actions the sorts of actions concerning which, his right of issuing a command is acknowledged.

He does not act either in his subordinate legislative, or in his executive capacity. They presuppose a more general command concerning the same actions and persons.

What does he do then? He makes a *compact*. He plights the *faith* of the nation to the observance of that compact. He acts as sole *agent*, as sole *representative* of the whole legislature. He is invested with a *full discretionary* power, to be used as *he* thinks best, and most conducive to the benefit of the whole.

This certainly is the exercise of a very different power from those which are exerted in either of his other capacities. The capacity itself then is different; no name has been found for it, unless that general undefined one of *prerogative*. But though no name has been invented, the thing ex-

ists, and ought to have a name; let us call it his *procuratorial* capacity.

The powers which he exercises in this capacity, this agency, this representation, are not perhaps derived from any positive act of the legislature: they are derived from custom, from the same source as most of the powers of the other constituent parts of the state are derived.

Had this plain and obvious distinction of the different capacities in which the king may be considered as acting, been sufficiently attended to, much useless argument on the present subject had been spared.

When the king acts in his procuratorial capacity, when he grants a *capitulation*, or makes a *treaty*, there is no conflict between different and contending branches of the sovereignty. It is not the executive power that binds the legislative; nor a part of the legislative that binds the whole. But the legislature is bound by its

its own constitutional agent and representative.

A capitulation is granted at the beginning of a war. It is stipulated, that till a definitive treaty of peace, the laws of the conquered country shall in all points continue in full force. The war lasts twenty years. Will any man pretend that the parliament has a constitutional right of infringing this stipulation? Of changing, during this interval, the laws of the conquered country? Surely not. For no one disputes but that all the articles of a capitulation are to be religiously observed.

A definitive treaty is signed. The country is yielded to Great Britain. One article of the treaty is, that the laws of descent and succession shall remain inviolate, such as they were before the conquest. Will any man say that the parliament can infringe this article? Surely not. For all the articles of a peace are to be religiously observed.

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Another article of the treaty is, that the mode of government, which obtained *before* the conquest in the conquered country, shall still obtain *after* the conquest. In consequence of this agreement all alterations in the old laws, all additions to them, are to be made by the chief executive magistrate, with the advice of his council\*. Is the parliament bound by this

\* This I apprehend to have been the case of Berwick upon Tweed before its incorporation into the kingdom of England. This I apprehend to be still the case with Minorca and Gibraltar. Upon no other principle can I conceive that an order of the king in council should be binding in Minorca or Gibraltar, any more than a proclamation of the king, unauthorised by parliament, should be binding in London or Middlesex.

Upon the same principle the different regulations made by successive kings in Ireland may be justified. They were all acts necessary to give full effect to this one original grant, "that the subjects of the English pale in Ireland should enjoy the English constitution *there* in Ireland." To this purpose these regulations were made by the sole authority of the king, in his subordinate legislative capacity, till the establishment of an Irish

## Part I.

### Sect. II. TO THE COLONIES. 35

this article? Certainly it is. This too is its own act, for it is the act of its own avowed constitutional agent.

Let us see how far this reasoning is applicable to acquired countries.

A Number of men, subjects of the realm of Great Britain, associate, with the design of peopling and cultivating a derelict country: or of purchasing from the natives, or acquiring by some other means, a tract of land thinly inhabited, and ill cultivated. They apply to the king for a charter. The king grants it. Now in what capacity can the king be considered as acting when he grants this charter?

parliament. From that time the regulations ceased. The king governed his Irish subjects by an Irish parliament.

The illimited power which I attribute to the king in his procuratorial capacity may be thought to be pregnant of danger. It may be so. Let it then be limited. Let the legislature draw the line, beyond which its agents shall not go. But till that line be drawn, the power exists, and has been uniformly exercised.

Plainly, he does not act in his supreme legislative capacity, nor in his subordinate legislative, nor in his executive capacities.

Every reason assigned above, in the case of his granting a capitulation, or signing a treaty, is applicable to the present case of granting a charter. By a charter I mean only an *original* charter, granted to new settlers.

He acts then, when he grants such a charter, in the same capacity as when he grants a capitulation, or makes a treaty. He acts in his procuratorial capacity.

In fact, to grant a capitulation, and to grant such a charter, are acts of the very same nature. Both are compacts, to both the faith of the nation is plighted.

When the king grants a capitulation what does he? He says to the enemy, "Submit yourselves to the power of Great Britain, and I, the agent, the representative of the sovereignty of Great Britain, will, in the name and by the authority

“ authority of that sovereignty, assure to  
“ you such and such conditions.”

What does he else when he grants a  
charter? “ Go, says he to the subjects,  
“ possess yourselves of this country;  
“ people it, cultivate it, submit it to the  
“ power of your country, and I, the a-  
“ gent, the representative of your sove-  
“ reign, will reward your labours by the  
“ assurance of such and such conditions.”

Can any reason be assigned why the  
faith of the nation plighted to an *enemy*,  
by the avowed constitutional agent and re-  
presentative of the nation, should be  
deemed sacred; and the *same* faith plight-  
ed to a *subject* by the *same* agent, and re-  
presentative, should not be deemed *equal-  
ly* sacred?

We may then, I think, safely conclude,  
that in granting a charter the king acts  
in the same capacity as when he grants a  
capitulation; that the one act is just as con-  
stitutional, just as valid as the other; that  
the terms of the one are to be as sacredly

observed as the terms of the other: that if either of them do in express terms restrain the parliament from exercising certain acts of its supreme power over the conquered or acquired country, the parliament is bound by that restriction, so long as the inhabitants of the conquered or acquired country adhere to the conditions on which the capitulation or charter was granted; but that to all other purposes they are subject to the supreme power of parliament, and can by no *after* act of the crown be released from that subjection. For the *one great* condition on which the capitulation or the charter is granted is, that the conquered or acquired country becomes *subject* of the *realm* of Great Britain.

The unconstitutional maxims adopted by the Stuart family, threw no small obscurity on this question. They were wont to consider all conquered or acquired countries as belonging to the king *alone*;

as being part of his foreign \* dominions, in the same manner as Gascony or Normandy, and as subject therefore to the authority of the king alone. Charles I. asserted this exclusive authority in a letter to the speaker of the house of commons.

After the Restoration, this idea was, in part at least, abandoned; and the countries acquired, whether by conquest or colonisation, began to be considered as parts of, or belonging to the realm.

Still however the line between respective powers of the king and parliament over them were far from being precisely drawn. It was far from being fixed, in what capacity the king acted when he granted charters.

The idea of a distinct sovereignty in the king over the colonies, unconnected with, and independent of the parliament, was indeed *apparently* given up. But many of the practices, which are to be jus-

\* See Pownall's Administration of the Colonies, ed. 5. vol. i. p. 122.

tified only by that idea, were still retained.

I shall only mention two. The first is, the giving to the king in council the power of hearing and determining, in *dernier resort*, all causes arising in the colonies. This regulation was a consequence of considering the colonies as part of the king's foreign dominions. Appeals lay in Normandy to the duke in council. They lie at present from Jersey, Guernsey, &c. to the king, as duke of Normandy. But if the colonies are part of the realm, such appeal is unconstitutional.

This is not only unconstitutional, but it is against an express law. For by the act, 10 Cha. I. c. 10. for regulating the privy council, and taking away the star-chamber, it is said (sect. iii.) "that the council hath of late assumed unto itself  
" a power to intermeddle in civil causes;  
" and matters only of private interest between party and party, &c. &c. By  
" which

Part I.

SECT. II. TO THE COLONIES.

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" which (says the act) great and manifold mischiefs have arisen." For remedy, the act not only abolishes the star-chamber, and the jurisdiction of several other courts erected on the same model, (sect. iii. and iv.) but likewise declares " that neither his majesty, nor his privy council have, or ought to have any jurisdiction, &c. by English bill, &c. to determine, or dispose of lands, &c. of any of the subjects of this kingdom," (sect. v.) Now are not all the colonies parcels of this kingdom? And if so, is not a judicial power thus exercised by the king in council over the colonies, exerted in the teeth of an act of parliament?

By a provision in 6 Anne, ch. 6. the two privy councils of the two kingdoms are consolidated into one; which privy council is to have the same powers as the privy council of England *lawfully* had before the union, *and none other*. Colonies were now established. Yet here no power



power of appeal is given to the king in council.

In truth, the constitution is so totally a stranger to this power assumed by the king in council over the colonies, that it has left him in a state of utter debility, uninvested with any coercive power to enforce the execution of his judgments. Of this debility a cause, at this moment depending in one of our colonies, afforded a striking proof. An order was sent to expedite it. This order produced the same effect on the judges as an equal quantity of blank paper. And as if simple disobedience were not enough, they treated it with scorn \*.

The second practice, which issues from the same source, and is equally unconstitutional, is the standing direction issued by the king to governors. They are au-

\* It was called "a *Whiteball mandate*." And as a reason for paying no regard to it, their reverences observed, "that the privy council might err as well as they."

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thorised, it seems, to exercise this power, not only according to their first commissions, and the terms of the charter, but "by such *further powers, instructions, and authorities* as shall at any time hereafter be granted or appointed them, under the signet or sign manual, or by order of *the king* in his privy council." Here the executive power takes upon itself to modify, to curtail, or extend the orders of the supreme legislative power, or what has been done or granted by the king in his procuratorial capacity. This surely is something more than a *subordinate* power of legislation. It is a power that rides *paramount* over all.

Another mistake, which has been constantly persisted in ever since the Revolution, is attributing to the king in his *subordinate legislative capacity*, powers which belong to him only in his *procuratorial capacity*.

Thus we have seen in the last section, that when the province of New England had

had forfeited its charter, king William granted it a second. And it was declared in council that he had a *right* to do so.

From the question of the king, and from the answer of the council, it is clear that both king and council considered the granting of the *original* charter, and the granting of this *second* charter, to be acts of the *same* power, exercised by the king in one and the *same* capacity. For all this, it appears pretty evident from what we have before laid down, that though called by the same name, they are acts of different powers, exercised by the king in different capacities.

The original charters granted to new settlers appear to be treaties, capitulations, compacts, made by the king in his procuratorial capacity. But these charters once forfeited, the settlers are in all points subject to the power of parliament. They are in the case of countries surrendering without terms, or settlers emigrating without a charter. A subsequent charter

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## SECT. II. TO THE COLONIES. 45

is no treaty; no compact; is not granted by the king in his procuratorial capacity. It contains only privileges, granted in his subordinate legislative capacity; and these privileges are not only revocable by any subsequent commands of the supreme legislature, but are no farther valid than as they are conformable to such of its commands as are now actually subsisting.

This is not a mere dispute of words; the distinction is important in its consequences.

Whatever the king does in his subordinate legislative capacity, is not only subject to the controul of the supreme legislative power; that is, to that body, of which he is an essential part, on the proceedings of which he can put an absolute negative; but besides this controul there is another in the judicial power, to which, I apprehend, what he does in his procuratorial capacity is not always subject.—When he grants charters, or makes treaties in virtue of this power, no court can judge of the

*pro-*

*propriety* of them. They are sacred to *them* as acts of parliament. If he makes regulations in his subordinate legislative capacity, the courts of justice *are* judges of their *legality*. They *can* tell whether the regulations are founded on original capitulations, or charters, on the laws allowed to be in force in the respective colonies, or in the general laws of the empire; and if they are not founded on any of these, the courts can give relief.

Farther, if the grant of capitulations, or charters, and all the other and subsequent regulations, made by the king in conquered or acquired countries, are made in virtue of one and the same power, then they are all, or none, controulable by the supreme legislation.—Of two consequences one would follow: Either the king is always *absolute* in conquered or acquired countries, independent of parliament, and uncontroulable by it; or *capitulations* and *charters* lose their properties, and cease to have the force of compacts,—

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If, on the other hand, the grant of capi-  
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pacity ; and all subsequent acts of the king,  
as acts either of the subordinate legislative,  
or of the executive power ; we have at  
once the line we were in search of ; a line  
shewing how far parliament is bound or  
restrained by any act of the king in the ex-  
ercise of that power, with which he is in-  
vested over conquered or acquired coun-  
tries.

The powers or exemptions granted by  
capitulations, or original charters, are what  
it cannot vacate. In all things else the in-  
habitants of conquered or acquired coun-  
tries are subject to the power of parli-  
ament.

SECT.

## S E C T. III.

*Is there any other principle in the constitution to restrain the operations of the whole body of the legislature on the particular point of taxation?*

**W**ERE a country to surrender to Great Britain, without any capitulation or treaty whatever, it would from that moment become subject to the British legislature, that is, to the authority of parliament; for the king would hold it in right of his crown, and he could by no act of his, after it's surrender, exempt it from the power of parliament. Whatever power the parliament could constitutionally exert over the other subjects of Great Britain, the same power it could exert over the inhabitants of a country thus surrendered without treaty or capitulation.

Were a number of British subjects to emigrate, and take possession of a vacant country,

## Sect. III. TO THE COLONIES.

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country, would they by such an emigration cease to be British subjects? I suppose not. Would they then cease to be under the jurisdiction of the British legislature? I suppose not. Subjection to the jurisdiction of the British legislature is the very circumstance which constitutes a British subject.

Consider the surrendering country as making a capitulation or treaty; consider the emigrating subjects as praying, obtaining, and accepting a charter, what would be their situation then? In this case they make a compact with the king, acting in his procuratorial capacity, as agent and representative of the whole legislature. In this capacity, and by this compact, the king engages to repeal, as to *them*, certain laws, and to establish others. A capitulation, a treaty, or a charter, does this, or it does nothing. It gives them powers, which, as British subjects, they had not by law. It exempts them from restraints, and

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from duties, to which, as British subjects, they were subjected by law.

What powers then must such compact be understood to have given them? Such powers as are therein *specified*, and moreover such *other* powers, *not* specified, as it is necessary they should enjoy, in order to exercise such powers as *are* specified. It gives them *these* and *no other*.

From what duties and what restraints must such a compact be understood to have exempted them? From such duties, and such restraints as are therein specified; and moreover, from such *other* duties and restraints as are *not* specified: but from which it is necessary to be exempted, in order to their full enjoyment of exemption from such duties and restraints as *are* specified. From *these*, and *no other*, it exempts them.

Whether among the powers conveyed, and the exemptions granted to the colonies by their charters, the exclusive power  
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of fixing their own internal legislation, and a full exemption from internal taxation by the British parliament, be indeed specifically named; or be necessary to the full exercise of the powers, or to the full enjoyment of the exemptions that *are* specified, is a question which will meet us in its proper place.

But may we not go farther? May we not say, that a case may be put, in which, beyond these, still other powers and exemptions, neither specifically named in the compact, nor necessary to the exercise and enjoyment of such as *are* specifically named, may yet fairly be supposed to be conveyed and granted by a charter? It should seem so, if those who accepted it did, from the beginning, understand the charter to have conveyed such other powers and exemptions; if in consequence of that interpretation, they have ever since constantly and uniformly exercised those powers, and enjoyed those exemptions; and if those who by themselves, or by their agent, granted the charter, did at the beginning acquiesce in this

interpretation, and have ever since constantly and uniformly allowed the exercise of those rights, and the enjoyment of those exemptions.

This language we may allow, I think, to be agreeable to the spirit of the constitution. The uniform exercise of any power, by any branch of the community, from the very foundation of that community, during so long a space of time, in the face of the legislature is, according to the definition we have already given of the constitution, a sufficient proof that such a power is constitutional.

If therefore the Americans should have been mistaken in their interpretation of their charters; if they should have supposed them to have conveyed more powers, or granted more exemptions, than they really were meant to convey or grant:—yet if that interpretation was coeval with the charters themselves; if their conduct was guided by it; and if, for more than a hundred years, parliament has looked on

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an unconcerned spectator, would not this be equivalent to what is called *custom* in the common law? Would it be politic all at once to assume a power to which parliament has no right; or having ought to have *asserted*, if not *exercised* it long before?—Would there be no injustice in treating as groundless, expectations authorised by the silence of parliament, imbibed by the present colonists, with the prejudices of their earliest infancy?

It is now asserted, that a full exemption from internal taxation by parliament, was always supposed by the grantees to be conveyed by the charters; and that this supposition has been constantly acquiesced in by parliament. What truth there is in this, is likewise a question, which will meet us in another place.

In the mean time there is another principle, on which the right of imposing internal taxes over the colonies, has been combated; a principle which has no relation to any particular charters; or to the

specific powers or exemptions grounded on them.

In support of this principle, the venerable name of Locke is \* rung incessantly in our ears :—he is to prove it to be founded in some immutable law of nature. And if this be not enough, should the apostolic order be inverted, should this immutable put on mutability, then the whole phalanx of lawyers, from Coke down to Blackstone, are to be brought up in array. They are to prove it an essential part of the British constitution.

The principle is this.—That no power on earth has a right to take away any part of any man's *property* † without his

\* It is remarkable, that those who now cite Locke, to prove a want of power in the parliament, should be the same who, on another occasion, cited the same Locke, to prove the king has a dispensing power.

† The term *property* is here used for the *thing* over which we exercise the right of *property*, and not for the *right* itself.

own *consent* freely given, either in *person*, or by his own representative, *freely* chosen. This right of nature (it is said) is particularly recognised by the constitution of our own country, where taxes are a *free gift*.

To judge of the validity of this maxim, the first point necessary will be to understand it. A point which has been overlooked, or overleaped by the greater part of those by whom the maxim is adduced.

To understand it, it will be necessary to define the terms of it.

This proceeding, I am sure, Mr. Locke would not have objected to, though peradventure in the present instance he forgot to adopt it.

What is property? It is that *thing*, I apprehend, or *good* which you, the proprietor, have a right to use in a particular manner, and you *alone*, to the exclusion of every other man whatever.

Whence arises this right? From the command of the *law*. It is the law which

says to *you*, the proprietor, take this thing, use it, enjoy it. It is the law, which says to every other man, do not take it, do not use it, do not enjoy it.

Take away the fence which the law has set around this thing, this good, whatever it be, and where would your right or property be then?

If this be a true definition of the term *property*, and to my understanding it appears so, what does this boasted maxim come to at last? Or how will you apply it to the point in question? It comes out after all, that the payment of a *tax* is not the giving up *any part* of our own property; it is the assignment only of a certain portion of the common stock to the support and maintenance of government.

That this idea of a tax has not been sufficiently attended to, arises perhaps from taxes being generally paid in *coin*, and not in *kind*. Where the tax is paid in kind it will appear less revolting.

Tythes,

Tythes, for instance, is a tax, and a very heavy, and perhaps an impolitic one too. Yet it appears at first sight that in the payment of this tax we do not give up any part of our property. The meanest farmer will understand you, when you tell him, that nine sheaves belong to (are the property of) himself, and the tenth belongs to (is the property of) the parson.

Let the same farmer compound for his tythes, and he will soon lose sight of this idea, he will soon begin to complain that he gives a part of his property to the parson. Yet clearly the money paid in lieu of the tenth sheaf is the purchase money for the tenth sheaf. The law has said to the farmer, nine sheaves are yours: the same law has said to the parson, the tenth is yours. The law has said to the parson, meddle not with the nine sheaves: the same law has said to the farmer, meddle not with the tenth.

Is not the same reasoning applicable to



taxes paid for the support of *civil* government? Are not these too the *property* of the civil magistrate?

The question then is not who is to give away *our* property; no man, no *body* of men is to do it. But who is to apportion and distribute the several parcels of the common stock. For when the legislature vests the property of so many acres of land; or the property of whatever thing or good you please in me, it is always with the implied reservation of so much of the produce thereof as the legislature *then* has, or at any future period *shall* keep back for the service of the community in general.

Taxes then cannot, in a proper sense, be called a *gift*, much less a *free* gift. For in the strict and proper sense nothing is *given*, if by *given* is meant ceding that which is our *own*, that which we have a right to withhold.

The commons indeed, in imposing aids and taxes make use of the terms "*give*"  
"and

*"and grant."* And the term is in them allowable enough. For the commons are invested with the whole property of the kingdom, in trust that they shall apportion and distribute to the supreme executive magistrate, that which is necessary to the support of his department of the government; and that they shall cooperate in securing to each man his share of the remaining parcel; which share *alone* is his property, and to be disposed of as he pleases. They give and grant to the magistrate, that which is necessary to the exigencies of the magistrate; and in the *same sense they give and grant* the residue, to every man his share.

On this false notion, "that the payment of taxes is the giving up a part of our property," is ingrafted another idea, no less false, "that taxes cannot in a free state be granted but by the *consent* of the giver."

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This idea of *consent* has been much insisted on by lawyers. It may therefore be right to state their opinions in their own words.

It would be tedious to cite them all. Let us then content ourselves with the words of a learned leader of them, who is himself a host.

"No subject of England (says he\*) can be constrained to pay any aids or taxes, even for the defence of the realm, or support of government, but such as are imposed by his *own consent*, or that of his *representative* in parliament."

To prove that every Englishman has really a representative in parliament, the same commentator informs us, "that only such are excluded (from the privilege of voting for a representative) as can *have no will* of their own; that there is hardly a *free agent* to be found, but

\* See Blackstone's Commentaries, vol. i, p. 140. 5. edit. octavo, printed at Oxford, 1773.

"what

"what is intituled to a vote in some place  
"or other in the kingdom \*."

That we may not however suppose that the consent of our representative depends upon our own personal consent, the learned commentator reminds us (of what is most certainly true) that "the representative, once chosen, is not bound to consult with, or take the advice of his constituents upon any particular point, unless he himself thinks it proper or prudent so to do †."

When the learned commentator comes to consider the foundation of the exclusive privilege of the commons, by which all grants of subsidies must originate in their

\* See Blackstone's Commentaries, vol. i. p. 172. The learned author is rather hard upon us in this passage. At a single stroke he deprives, I believe, three fourths of our fellow citizens of free will and free agency. Upon another occasion he is as singularly generous; he bestows free will and free agency on rays of light, watches, &c. &c. See ib. p. 38.

† See his Commentaries, vol. i. p. 159.

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house, he rejects the general reason assigned for it, "that the supplies are raised upon the body of the people, and therefore it is proper that *they alone* should have the right of taxing themselves,"—and assigns another, "that they are a *temporary elective* body, freely nominated by the people, and therefore less liable to be influenced by the crown; and when once influenced, to continue so, than the lords, who are a permanent and hereditary body, created at pleasure by the king\*."

The attentive reader will observe, that

\* See his Commentaries, vol. i. p. 169. The circumstance of their being a *temporary and elective* body, is no doubt *one* good reason why the commons should be entrusted with the power of a taxation; as the circumstance of the lords being a *permanent and hereditary* body, is a very good reason why they should *not* be entrusted with it. The danger however would, I apprehend, arise, not from the influence of the *crown*, but from *partial* attachment to their own interests. The distinction of *terres, nobles, &c.* would soon arise, if the power of taxing were intrusted with the peers.

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the citations produced, though all occur-  
ring within the compass of a very few  
pages, are not easily reconcilable to each  
other.

In the first it should seem that the pri-  
vilege of granting aids is appropriated to  
the commons, on account of their *repre-*  
*sentative* capacity; in the last it is no long-  
er on that account, but because they are  
a temporary and elective body.

In the first it should seem that *their* con-  
sent to a tax makes such a tax constitu-  
tional; because *their* consent is the ex-  
pression of the consent of their *constituents*.  
In the second it appears, that the consent  
of the constituents is a matter of perfect  
indifference.

These contradictions I found, I did not  
make them.

"No subject can be constrained to pay  
"any tax but by his own consent freely  
"given, either in person, or by his own  
"representative." This is the fence which  
our lawyers tell us the constitution has  
placed

placed around Mr. Locke's *natural* right of not parting with our own property, but with our own *consent*.

This is a question of facts: let us then appeal to facts.

If there be any truth in this assertion, it must follow, that the constitution has given to every man who is to contribute to a tax, the right of voting for his representative. No man who has eyes to see, and who chuses to make use of them, can seriously believe this to be the case in England.

Many, who are not poor enough to be ranked among the non-willing, (supposing with our commentator that want of *wealth* implies want of *will*) are yet burghesses of no borough, have no freehold, have none but copyhold lands; these men have no votes.

Many a man hires a piece of ground for a long term; he gives perhaps ten pounds a year; he builds on it; the rent of the house he builds is sixty or eighty pounds

pounds a year: surely he is *rich* enough to have a *will* of his own. He ought therefore to have a *vote*.

The holders of stock are surely rich enough to have a will of their own. Their attachment to the constitution cannot reasonably be supposed to be less strong, less enlightened, less active than that of landholders. Their *all* depends upon the preservation of the constitution. Yet these men have no votes.

How many hundreds of our fellow citizens have large capitals engaged in manufactures: surely they are rich enough to have a *will*. Yet neither have these men any votes.

Sum up the number of citizens under these several descriptions; add the other numerous classes of citizens, who, though rich enough, as the phrase is, to have a will, have yet by the constitution *no right* to vote. Then sum up the number of those who *have* that right, strike the balance, and it will be found that the non-

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voters



voters are nearly three fourths of the whole mass of citizens.

Here then the maxim fails; it is not essential to the character of a freeman who is to contribute to a tax, that he have a right of voting for his representative. The greater part of the subjects of England, though they contribute to taxes, have no right of voting for their representatives.

Nor even of those who *have* a right to vote can it with any degree of truth be affirmed, that their own personal consent, or the personal consent of their representative is necessary to render a tax *legal*. If it could, it would follow, that no *representative* could be chosen but by the *unanimous* consent of every *constituent*, that no *law* could pass without the *unanimous* consent of every *representative*.

Here too, thank heaven, the maxim fails.

There exists a country, if indeed Poland can be said to exist, where this idea of personal individual consent was adopted and carried

## Sect. III. TO THE COLONIES. 67

carried into execution. With what success, let its present melancholy state declare. The whole fabric of the Polish government, all the absurdities with which it teems, are the natural consequence of this very principle; that no subject should obey a law, or pay a tax, which is not imposed by his own free consent, given by himself or his representative.

Yet this principle, pregnant with such fatal consequences, have many of the friends of America chosen as a shield to protect the colonies against the power of the British legislature. This principle has the same extravagance laid down as the corner stone of British *freedom*.

Still however we are told, "representation and taxation are inseparable." Ask for proofs, urge the number of persons not represented and yet taxed, you may puzzle, but you will not convince.

One gentleman\* asks himself "what are the exact bounds and limits of "real representation?" I was impatient to hear the question answered by so *able* and *acute* a writer.

But alas! "he excused himself from "entering into the matter †." What a loss to the world! Why did he not prove in his own *concise* and *nervous* style, that the Americans should be "excepted and "exempted from the reasons and the "rules which obtain and take place in the "case ‡ of other unrepresented subjects?" But it is probable, to make use again of his own happy expression, "the matter seemed to him so clear, that whoever should "multiply words on this subject, would "hardly do it for the sake of being convinced §." Whether this gentleman's

\* Author of the Considerations on the Measures carrying on with respect to the British Colonies in North America.

† See p. 130.

‡ See ib. p. 19.

§ See ib. p. 13.

aim be to convince himself or others I know not. But words surely he does multiply.

Others, rather than give up their favorite position, tell us, that the *land* is represented \*.—Be it so—though it is true only of *freehold* land; but whose consent is it that is given then? Is it that of the beast who grazes on the land, or the plant that grows on it, or only of the land itself?

But if neither authority nor argument will convince us, the letter of acts of parliament must do the business.—The cases of Chester and Durham are cited as conclusive.

I allow all the weight that is due to them; and yet I might perhaps have been mistaken enough to have cited them in defence of the opposite opinion. So far from proving that representation and taxation are inseparable, they prove the contrary. The Durham act expressly says, that before the

\* This idea occurs in several American writers.

inhabitants of that county were represented, " they were liable to *all* payments, " rates, and subsidies, *equally* with the inhabitants of other counties, cities, and " boroughs, who had their knights and " burgesses in parliament\*." Allow the act to prove, that it is expedient, that those who are taxed should be represented, yet to make the case of the Americans parallel to the case of those who were the objects of this act, they must petition to send knights and burgesses to parliament:—and be refused. Nor does this Durham act support the necessary connection between *consent* and representation, any more than between representation and taxation.—Representatives are not spoken of as men who stand in the *place* of another, empowered to give the *consent* of that other.—They are not said to represent, that is, act in the name, or by the authority, of their constituents: but to represent, that is, dis-

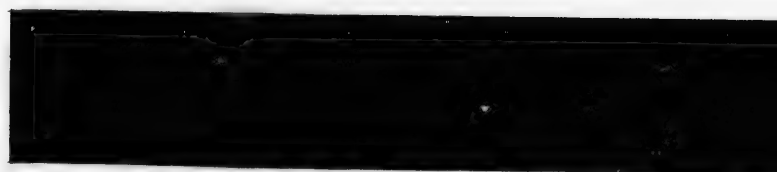
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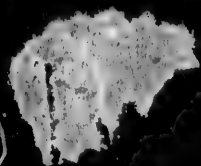
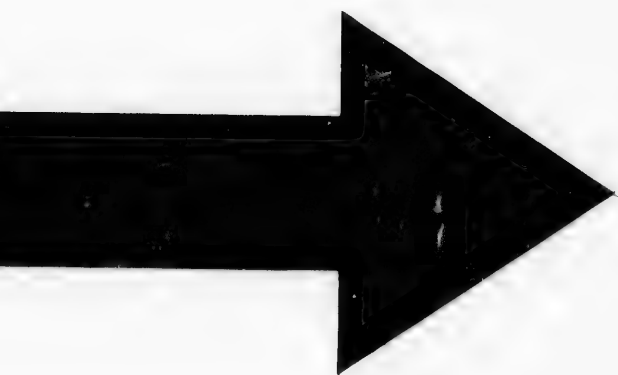
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play, set forth—"the *condition of their country.*" What is this to the plea of not being taxed without consent?

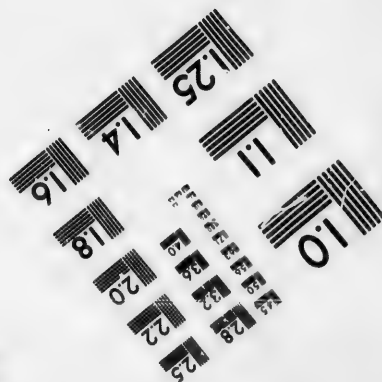
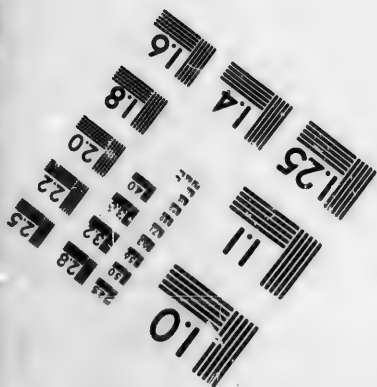
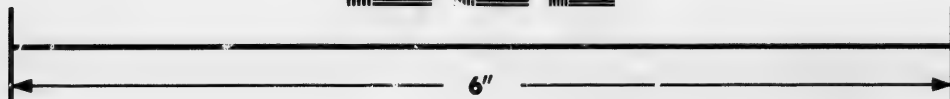
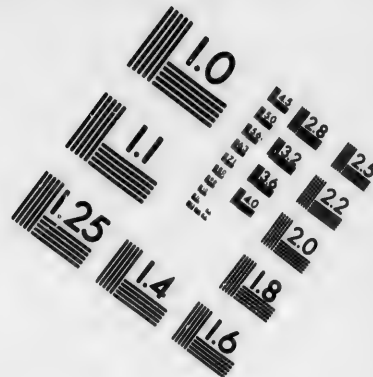
I may here perhaps be told, I expect to, be told, that I am destroying the distinguishing characteristic of English happiness: beating down the strong bulwark of English liberty. If an Englishman has no property but what government pleases to leave him; if government can take what he has, without his *consent*; where is the difference between him and the subject of a despotic prince: between an Englishman and a Turk?

It is not my fault if I cannot see *property* where it is not. I can form no idea of property, other than that which I have given. That *only* is my property which the legislature declares to be so. In this a Turk and an Englishman are indeed on the same footing. I cannot therefore consider a *tax*, imposed by the legislature, as a part taken from my property. It is only a diminution of the share I have hitherto, or should otherwise









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therwise have, enjoyed out of the common stock.

I cannot believe that my *consent* is necessary to render this diminution a legal, constitutional act; because I know that neither was my own consent ever asked, nor, of six hundred men only excepted, that of any other man in the kingdom. The consent of the rest is no more asked, or given, than our consent was asked or given by our godfathers and godmothers, to the baptismal vow they made for us at the font.

What the commons agree to, becomes, notwithstanding, a command of the legislature. We are bound to obey it. We may, we can be, we are constrained to obey it.

Neither in this is there any difference between an Englishman and a Turk.

The resemblance however does not startle me: though there be some features alike, there is difference enough to distinguish us.

That

That difference will be found in the nature of the body, to whom our constitution has so wisely entrusted the power of taxation ; the power of apportioning and distributing the whole stock of the community. It is the circumstances, it is the particular relation, *that* body stands in, to the whole community, which makes this power, so dangerous in the hands of a despotic government, to be so very innocent in theirs : and which therefore constitutes in this respect the essential difference between a subject of Great Britain, and the subject of a despotic government.

In despotic governments the power of taxation, the power of apportioning and distributing the whole stock of the community is vested in a single man, or in a fixed and permanent body of men ; they *may* have, they almost always think they have, a separate and distinct interest from the rest of the community. In England, this power is vested in a temporary and elective body. They cannot have, they cannot

cannot think they have, a separate and distinct interest from the rest of the community. They are *now* a part of the taxing power; they may soon cease to be a part of it.

In an absolute government every diminution of my share in the public stock, is just so much added to the share of him who is to apportion and distribute that stock. In our government it is quite otherwise. Every diminution of my share in the public stock necessarily causes a proportionable diminution in the share of those who are to apportion and distribute that stock; and the constitution has provided that their share shall not be small. If I lose a bushel, each of them will lose a load;—if I pay shillings for the windows that light my cottage, each of them will pay pounds for the windows that illuminate his house\*.

This

\* I can recollect but one instance where this perhaps does not hold altogether.—And that is in the duties laid on beer that is brewed for sale.—If  
all

This is my security. It is a real and permanent one. I understand what it means :—it is obvious to my senses ; but I understand nothing of a consent which was never given, which was never even demanded.

But do the commons of Great Britain stand in the same relation to the inhabitants of America ? If they do not, have the commons of Great Britain, according to the spirit of the constitution, a right to lay internal taxes in America ?

If they *do not* stand in the *same relation*, we are, I think, warranted in saying, that, according to the spirit of the constitution, they have *not* the *power* which is entrusted in consequence of that relation.—For if it be true, that the colonists, by emigration, were not released from their *allegiance*, it is equally true that they forfeited not their

all the duties on malt and beer were consolidated, and laid on malt in the first instance, it would be at once more equitable, and, I should apprehend, more fruitful in the product, as well as less expensive in the collection.

*rights.*

*rights.* If they are subjects to one purpose, they are subjects to all. Now it is the constitutional right of a British subject that the legislature do not tax him, but by the mediation and authority of a certain body of men, who stand to him in that particular relation we have above described; and in which the commons *do* stand to every inhabitant of Great Britain.

Does that relation subsist?—In strictness of speech I think it does.—The advocates for the colonies tell us that the acquisition of America has trebled our manufactures; has almost doubled the value of our lands\*. The ruin, or the oppression of America, would deprive us of these advantages; and would therefore be as severely felt by the members of the house of commons, as the ruin or oppression of Great Britain. In strictness of speech then, the commons cannot tax America without at the same time taxing themselves.

\* See Mr. Pitt's speech on the repeal of the stamp act.

The

The reciprocity of interests is as real between them and the Americans, as between them and the other subjects of Great Britain.

But though it be as *real*, it is not so immediate in its effects, nor so *apparent* to those who are to pay the tax, perhaps not always to those who are to impose it. Possibly therefore it might not produce the same effects on the minds of the taxers: most certainly it would not give the same sense of security to the *taxed*.

To give the parliament therefore a right of taxing the Americans, without violating the spirit of the constitution, something farther perhaps may be required.—The act of taxation itself must create the circumstances which are wanting to render the reciprocity of interests, not only as real, but as apparent, as well to those who are to impose, as to those who are to pay, the tax. This it should seem is what might be done without much difficulty.



A short plan for this purpose will be offered at the conclusion of this volume.

And under these restrictions it should seem, that the parliament would have a constitutional power of taxing the Americans.

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## S E C T. IV.

*Summary of the arguments on the matter of  
right.*

FROM what has hitherto been said it appears, that by the constitution the king is invested with the power of granting what form of government he thinks best to all conquered or acquired countries.

That articles of capitulation, and treaties of peace, though made by the *king alone*, are binding on the whole legislature.

That the terms of original charters granted to subjects forming new settlements, though granted by the *king alone*, are by parity of reason binding on the whole legislature.

That this power has been exercised by successive kings, and recognized by the tacit consent of successive parliaments, as appears in the cases of Ireland, of Wales, of Berwick upon Tweed, of New-York,

of Jamaica. And since the Revolution in a more remarkable instance.

From these precedents the power may fairly be concluded to be constitutional.

It has farther appeared, that in the exercise of this power the king acts neither in his supreme legislative, nor in his subordinate legislative, nor in his executive capacity; but in another capacity, distinct from them all:—as the constitutional agent, and representative of the whole legislature; of the whole nation: and which therefore we have called—his *procuratorial* capacity.

That in this capacity he does not issue commands, but enters into *compacts*.

That these compacts, whether made with enemies or subjects, are binding on the whole legislature; being indeed the acts of the legislature itself; inasmuch as they are the acts of that person who, by the constitution, is appointed the agent and representative of the whole legislature.

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It appears farther, that by these compacts the parties contracting, whether conquered or settled, do agree with the king to recognise themselves and their country to be subject to the supreme legislature of Great Britain: and the king on his part does agree with them to repeal, as to them, certain laws and establish others; to convey to them certain powers, which, as subjects they would not have by law; and to exempt them from certain restraints to which, as subjects, they would be subjected by law.

From hence it follows, that the Americans have, by the constitution, a right to all the powers and exemptions specified in their original charters; to all the powers and exemptions *not* specified, but necessary to the enjoyment of those which are; and we have ventured to allow farther, to all such as from the beginning of the contract were, and down to the present time have been, by both parties, understood and allowed to be intended by them.

G

But

But these powers and exemptions excepted, they are to every other purpose subject to the supreme legislature of Great Britain. So that whatever power the supreme legislature of Great Britain could exercise over other subjects, the same it can exercise over them.

It appears therefore, that unless an exemption from internal taxation by the supreme legislature of Great Britain be among the exemptions thus specified, or necessary to the enjoyment of some other power or exemption that *is* specified, or at least such as hath always been understood on *their* part, and allowed on the part of the *legislature* to be intended in the original charters, the supreme legislature *may* exercise this power of internal taxation over its subjects in America, under certain restrictions.

For it has appeared that by the payment of a tax we do not give up any part of what is our *property*; that the British house of commons is vested with the whole  
property

property of the kingdom in *trust* to apportion what is necessary to the governors for the ends of government; and that what *remains* after the payment of such portion, and that *only* is our property.

It appears farther, that when our consent, or the consent of our representative is said to be necessary to such appointment, the personal consent of each individual subject, or of each individual representative, is what cannot be intended.

For it has appeared that by far the greater part of the inhabitants of Great Britain *do not* give their consent either to the *levying* a tax, or to the *nomination* of those who levy them. Nay, that in no period of time they ever did. For at no time was this right attached to others than to burgesses of certain boroughs, and to landholders of a particular description.

And it has therefore appeared, either that representation and taxation are not inseparable, or that representation means something different from what it has been

by many understood to mean. The term "body of representatives" has by many been understood to mean, a body of men chosen by the *whole*, or by a *majority* of the community. But it appears that there is no such body; the term therefore appears to mean a body of men chosen by a *part* of the community; but so circumstanced and related to the rest, that they cannot have or *think* they have any separate interests of their own to pursue, to the prejudice of the rest.

It appears that the house of commons does stand in these circumstances, and under this relation to the inhabitants of Great Britain.

These circumstances, and this relation, consist first in their being an *elective*, secondly in their being a *temporary* body; and lastly, in their being themselves a part of the persons *taxed*, at the same time that they are the *taxers*.

The two first of these circumstances are equally true with respect to the Americans,

## Part I.

cans, as with respect to the greater part of the inhabitants of Great Britain.

With respect to the last and most material circumstance, it appears that modes of taxation *might* be invented, which would create that relation, that indivisibility of interests.

And it has therefore been, we think, fairly concluded that *such* a mode of taxation would be constitutional. Because the commons would, under these circumstances, exert no other power over the inhabitants of America, subjects of Great Britain, than they can by the constitution exert over *all* the other subjects of Great Britain.

To taxation therefore, under this mode, no constitutional objections can lie but such as are drawn either from the express words or necessary implication or ancient uniform construction of the original charters.

Can such objections be drawn from thence?



## P A R T II.

ENQUIRY INTO THE MATTER OF  
FACT.

## S E C T. I.

*What were the privileges granted to the first settlers in North America by the Virginian Charters?*

WHAT were the privileges originally granted by the crown to the colonies? A review of the charters is the only means of answering this question.

The first charters were called by the general name of the *Virginian charters*. The territory they take upon them to dispose of, is a tract of land mentioned in

in them under the name of *Virginia*, and described as lying between the 34th and 45th degrees of Latitude. A tract in which are comprised a large part of the colony of New England, together with the entire colonies of New York, New Jersey, Pennsylvania, Maryland, Virginia, and North Carolina, and a small fragment of South Carolina.

The earliest of these charters grants to Sir Thomas Gates, and others, the whole precincts above described, to be divided into two several plantations. It was granted by king James I\*.

The preamble sets forth, that certain persons therein named, and others not named, had besought the king to grant them his "licence to deduce colonies" into such parts of America, as lying be-

\* See Collection of Charters printed for Owen, Almon, and Blyth, in 4to. 1766, No. I. The charters in this collection are referred to as authentic by Mr. Mauduit, in his Short View of the History of the Colony of Massachusetts Bay.

tween four and thirty, and five and forty degrees of northern latitude, did either already appertain\* to the king, or at least were not in the possession of any other *christian* prince :

That these adventurers meant to divide themselves into "two several colonies and "companies;" the one consisting of certain knights and others of the city of London and elsewhere, who meant to begin their plantation in some convenient place, between four and thirty and one and forty degrees; the other consisting of certain knights and others of Plymouth and other places, who meant to begin

\* There is nothing more ridiculous than this assertion, that these lands did already appertain to the king, or that such as did *not* appertain to him, might yet be occupied by his order, provided they did not belong to any *christian* prince. This language was borrowed from the crusaders, and can be justified only by the madness of fanaticism. It is melancholy, but useful, to observe how long the effects of popular errors remain, even after the errors themselves are exploded.

their

their plantation in some convenient place between thirty-eight and forty-five degrees of latitude:

That the king greatly commends, and graciously accepts their desires for the furtherance of a work which might tend to the *glory of the divine majesty*, in propagating the christian religion \*: And therefore,

Grants to the class of adventurers of the *city of London* the title of *first colony*, with leave to begin their plantation at any place on the coast of America between thirty-four and forty-one degrees, and to take possession of all the lands, &c. within the precincts there described, there to inhabit and fortify, according to their best *discretion*, and the discretion of the council of that colony.

His majesty grants to the adventurers from the *west of England* the title of the

\* To which purpose his majesty gives them leave to rob and plunder *all but christian princes*.

*second,*

*second, or Plymouth colony*, with leave to begin their plantation at any place on the coast of America between thirty-eight and forty-five degrees of northern latitude; and invests them with the same exclusive privileges with which by the preceding article he had invested the first, or London colony.

By the preceding clauses *all* the lands lying between thirty-eight and forty-degrees inclusively, were left open to each company alike. First occupancy it seems was to fix and determine the property.

It is therefore provided that the plantations of those who shall settle last, shall not be made within one hundred English miles of those who should be first planted.

The king ordains that each of these colonies shall have a *council* to govern and order *all* matters and *causes*, which may arise *within* the colony, "according to  
"such laws, ordinances, and instructions,  
"as shall be in that behalf given and sign-  
"ed with his hand, or sign manual, and  
"pass

"pass under the privy-seal of his realm of  
"England."

The king fixes the number of each of  
these councils, who "are to be *ordained*,  
"*made*, and *removed* from time to time,  
"according as shall be *directed* and com-  
"*prised* in the same *instructions*."

Besides these colonial councils, one su-  
perior domestic council is established, to  
consist of thirteen persons, to be *appointed*  
*by the king*, to be called "the council of  
"Virginia, to have the superior *manag-*  
"*ing* and *direction only*"\* of all matters  
"that may concern the government, as  
"well of the several colonies as of any  
"other place within the aforesaid pre-  
"cincts of thirty-four and forty-five de-  
"grees of northern latitude."

The colonists are allowed to work, for  
their own profit, all the mines of gold, sil-  
ver, and copper, as well within, as on  
the main land on the back of the colo-  
nies, paying to the king one fifth part of

\* That is, I suppose, *they only*.

all the gold and silver, and one fifteenth part of all the copper to be found there, without *any other manner* of profit or account to him.

The right of coinage also is allowed them.

They are allowed to carry over all such persons as are willing to go with them, and not "*specially restrained by the king,*" with "sufficient shipping, and furniture of armour, weapons, ordinance, powder, victual, and all other things necessary for the plantations, their use and defence."

They are empowered to make a defensive war. That is, to repel by force all "*intruders*" into their settlements, all "*annoyers*" of them.

They are allowed to impose *a duty of two and a half per cent.* on all merchandises imported into the said colonies by persons not being of the said *colonies*, but being of realms or dominions under the *obedience* of the king, and a duty of *five per cent.* on all merchandises imported  
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# Sect. I. TO THE COLONIES. 93

by persons neither being of the colonies, nor subjects under the *obeyfance* of the king. And to enforce the payment of these duties, they are allowed to *seize, and detain*, the persons, ships, and goods of the importers.

The duties thus collected are appropriated: during the space of *twenty-one years*, "they are to be wholly employed "to the *use*, benefit, and behoof, of the "said several plantations, where such traf- "fick shall be made. At the expiration "of that term they are to be taken to the "use of the king, and collected by such "officers and ministers as the king shall "appoint."

They are allowed to "transport goods, "chattel, armour, munition, and furni- "ture, needful for their apparel, food, "defence, or otherwise; out of the realms "of England and Ireland, and *all* the o- "ther dominions of the king, without *any* "custom, subsidy, or other duty during "the space of *seven years*."

The



The inhabitants of the colonies, and such of their children, as shall be born within the precincts of them, are to enjoy "all the liberties, franchises, and immunities, *within any of the king's other* dominions, to all intents and purposes, "as if they had been abiding, and born "within the realm of England, or any "other of the said dominions."

The king farther engages, on petition being made, to grant to such persons as the respective council of each colony shall name, all the lands contained within the precincts of the colonies "to be holden "of the king, as of his manor of East "Greenwich in Kent in *free, and common* "soccage only, and not in capite."

Three years afterwards the king granted a second charter, explanatory of the first. So far as the first related to the "first or London colony." It is dated the 23d of March, 1609\*.

\* See Collection of Charters, No. II.

A great number of new adventurers, including all the companies of London, are here named. They, and such others as they should hereafter associate, are erected into a body corporate, under the title of "The treasurer and company of adventurers, and planters of the city of London, for the first colony of Virginia."

Under this name they are allowed to purchase lands in England or Wales; to plead, and to be impleaded.

The grant of lands is extended, and they are to be apportioned, and distributed, by the treasurer and company, to the several adventurers: proper regard being had both to the proportion, merit, and services of each adventurer.

A new domestic council is appointed\*: the treasurer and members of the council, pro hac vice, are named by the king; but are hereafter to be nominated, displaced,

\* In the former charter *one* domestic council had "the superior managing and direction" of *both* colonies: now a domestic council seems to have been appointed to each of them separately.

or continued, not (as in the former charter) by the king, but by a majority of the adventurers. Each member newly chosen to take the oath of counsellor before the Lord Chancellor, the Lord High Treasurer, or the Lord Chamberlain.

To this council power is given to constitute and confirm, or to discharge and change, all officers, governors, and ministers, needful to the government of the colony.

The council has farther the power of establishing, or changing the form of government in the colonies; of making, and abrogating laws to be observed within the precincts of the colony, or upon the seas in going or coming.

The governors and officers appointed by the former charter, are commanded to be obedient to the governors and officers appointed under the present charter.

The council has the power of admitting new freemen, of disfranchising old ones.

It has the same power of engaging settlers, and of free exportation for seven

years, as was granted by the former charter.

The company is freed from all subsidies, and customs, in Virginia, for one and twenty years; and *for ever* from all taxes upon goods imported thither: as also from all taxes upon goods exported thence into England, or other the king's dominions, five per cent. only excepted: which sum being paid, they may within thirteen months after their first landing in England, or other the king's dominions, re-export them for sale in *foreign* parts, without *any custom, tax, or other duty*.

The power of imposing duties on non-freemen, is confirmed and extended. The duties (over and above what are paid by the freemen) are to be five per cent. for non-freemen, who are subjects of the king's dominions, and ten per cent. for non-freemen, who are not subjects. The duties are appropriated as before in the former charter.

H The

The treasurer and company, and the governors and officers, appointed by them, are vested with a full power "to correct, "punish, pardon, govern, and rule all "adventurers, according to such orders, "as by the said council shall be appointed; and in defect thereof, according to "the *good discretion* of the said governor "and officers:—as well in cases capital "and criminal, as in civil, both marine "and others.—So that the said statutes, "ordinances, and *proceedings*, be as *conveniently* as *may* be, agreeable to the "laws and policy of England."

The governor in chief is vested with the power of executing martial laws in cases of mutiny and rebellion, in as large and ample a manner, as the lieutenants of counties are in England.

All privileges granted by the former charter, and not revoked by this, are reconfirmed.

And it is provided that no new adventurer shall be permitted to go into the colonies,

lonies, till he has taken the oath of supremacy. A precaution intended to prevent the spreading of the Romish superstition.

About two years after this, another charter was granted, to extend and explain that which we have now given an account of\*.

By this charter, weekly meetings, and general quarterly courts are directed to be holden.

A power is given of suing defaulters, and compelling them to make good their engagements.

A power is given of conferring the freedom of the company to *aliens*; provided they be subjects of states in amity with the king.

A power of administering, not only the oaths of allegiance and supremacy, but such other oath as the council shall think

\* See Collection of Charters, No. iii.

fit, to persons employed in the plantation; and to such witnesses as may be called to clear up any matter in controversy.

Another power there is, if possible, still more extraordinary than any of the preceding: a power, than which, had it been exerted, none could well bid fairer to bring a colony to ruin.

It seems complaint had been made, that artificers and others, after having received premiums for engaging in the service of the company, had either refused to go to America at all, or being *there* had misbehaved themselves; and on their return, being convened before the council here, had behaved contemptuously to that court; and had endeavoured, by *slandrous reports* to discourage others from "joining in the adventure."

To remedy this evil, the king empowers *any two* of the council to bind over such persons to their good behaviour, and to proceed against them as is usual in other

like cases in the realm of England :—" or  
 " else" (says the charter) " at their *discre-*  
*tion*, to *remand*, and *send back* \*, the  
 " said offenders, unto the said colony in  
 " Virginia, *there* to be *proceeded* against,  
 " and *punished*, as the governor, deputy, or  
 " council there, shall think *meet* : or other-  
 " wise according to such laws and ordi-  
 " nances, as are and shall be in use there,  
 " for the well ordering, and good govern-  
 " ment of the said colony."

The more attentively we consider these  
 charters, the more we shall be convinced,  
 that they cannot operate to the support of  
 the claims set up by the Americans of this  
 day.

One of the grants is evidently *illegal*.  
 It gives a power, which the king could *not*  
 convey, in whatever capacity he be con-  
 sidered as acting. In his *procuratorial* ca-

\* To wit, as well those who had returned  
 from thence, as those who had never been.



capacity, no doubt, he might give *powers*, and grant *exemptions* to the colonists, which they had not by law. But he could not, therefore, deprive his other subjects of the protection they enjoyed by law, or subject them to burthens, to which they were *not* liable by law. Yet the king assumes the power of doing this. He conveys to the council a right of exercising that power in a manner more wanton and cruel, than was ever practised by the Star-chamber. Any *two* of the council might send any *man*, accused of certain misdemeanors, to America \*; there to be *punished* as the governor and council *there*—at once judges and parties—should think meet.

\* The Americans are vehemently offended at the acts of parliament made for sending to England, persons charged with treasonable violations of the laws, or with homicide or mayhem, committed in the execution of them. The same persons scruple not to assert their right to all the benefit of a charter, which sends Englishmen over to America to be tried for slander.

Among

Among the misdemeanors recited, one is, "*spreading of slanderous reports* of the county of Virginia." Who can doubt but merchants, interested in the success of the plantation, would have construed a true and fair account of the hardships to be undergone, and the difficulties to be surmounted, by the first settlers, into *slanderous reports*?

But, besides that such a clause is enough to vitiate the whole of the third charter, we may remark upon the *general* view of them all, that they certainly had not any such state of America as the present in contemplation; and that they contain scarce any provision *applicable* to it.

The *pretext* set forth for establishing these colonies, was the old stale one of "*promoting the glory of God*." A pretext which no man, who has turned over a single page of history, can hear of without shuddering. The *real* motive on the part  
H 4 A ni b... of

Among

of the *adventurers*, was the hope of establishing a lucrative *trade*: on the part of the *crown*, was the hope of *enriching* itself by the discovery of *mines* of gold and silver. To this purpose, two exclusive trading companies are established.

These companies, it is true, are invested with some of the powers of sovereignty; that is, such of them as appeared necessary to the support of their exclusive trade. What rights does this convey, to the colonists, to those who were to *cultivate* and *inhabit* the wilds of America? Does it convey to them the right of enjoying *there* in America all the blessings of the English government?

As to Ireland, the privilege of enjoying in Ireland the English form of government (if we may believe Dr. Leland, and his authorities) was granted to the adventurers who settled in that country; but is any thing *like* this promised to the adventurers who settled in America? No; all the  
English

English rights they could ever have exercised *here in England*, are indeed preserved to *them*, and to their children *born in America*. What follows? They may come then at any time and claim them.

It may not perhaps be difficult to give the reason for the English form of government, having been communicated to the first settlers in Ireland, and not to the first settlers in America. The *adventurers* and *settlers* in Ireland were the same persons; the chiefs who led over their friends and dependents to fight for Dermod, meant to settle there themselves; and they therefore asked and obtained the communication of the English law in their new settlements. But the original adventurers, and the original settlers in America, were two different classes of people; the one were servants of the other. The adventurers therefore obtained as many of the powers of sovereignty as they could for themselves; but for the *settlers* they asked only,

only, that they might not forfeit the rights they could otherwise have exercised here, that they might not be punished as fugitives, nor their children disinherited as aliens.

Their lands 'tis true are granted in free and common soccage, and compressed, by force of a fiction, within a small district of the mother country. What right results from this? Make the most of it, no other than that of voting in the election of representatives for that district.

The king indeed promises that he will lay no imposts, for a certain limited period; and accepts a stipulated sum in lieu of all imposts thereafter. But what exemptions did the settlers gain by this? The power of imposing taxes on them was still vested in a council established at *London*; that is, in an elective aristocracy. By the first charter this council was to be appointed by the king, and though the second charter gave the power of appointment

ment to a majority of the adventurers, yet what did the settlers gain by this? The electors resided in England, and the council sat in England.

The Americans, I believe, would hardly contend for such a government as this. They would think themselves safer, I am persuaded, in the hands of a British parliament, than in those of an aristocratical council so elected.

The provisions of these charters were calculated for an exclusive trading company. Colonization was considered only as subservient to commerce: the rights of the colonist would have been buried under the weight of mercantile interest.

But in truth these companies subsist no longer. The lands which were granted to them, have, either by the authority of succeeding kings, or by the acts of their own council, been parcelled out to other adventurers. A cluster of governments have arisen, and if the present claims of the Americans are to be supported by

charters, it must be by the charters granted to these later settlers \*.

\* It was thought, however, necessary to state these original charters ; they at least serve to shew the spirit with which the first settlements were undertaken. There appear to have been other charters explanatory of the first, so far as it related to the grants made to the Plymouth company : as the two last are explanatory of it, so far as it relates to the grants made to the London Company. But they are not to be found, so far as I know, in any printed collection.

SECT.

## S E C T. II.

*What were the privileges granted by the crown to the people of New England, by first charter of Massachusetts Bay?*

THE patentees of what was styled the second, or Plymouth company, in the Virginia charters, had spent large sums of money with the hope of effecting a permanent and advantageous settlement \*. Tired out with repeated losses, they were on the point of abandoning the adventure, when some other men of fortune took it up. In the year 1620, these last obtained a new patent explanatory of the first †.

It was about this time that one White, a clergyman of Dorsetshire, was looking out for a settlement for some ejected mini-

\* See Mauduit's Short History of Massachusetts Bay.

† Ib. I do not find that this charter is any where extant in print; but it is referred to by the first charter of Massachusetts Bay.



sters. He entered into a treaty with the Plymouth company, by order and in the name of Sir Henry Rosewell, and five other gentlemen of Dorsetshire, to whom the company sold the part of New England \* therein described as lying at the bottom of Massachusetts Bay.

These new adventurers found the undertaking to exceed their forces. Other gentlemen being applied to, associated with them. A new draught of the former patent was made out, in which the names of the new associates were inserted, and the transaction was confirmed by the king.

The council residing *in England* were still the directors, and supreme managers,

\* This name of "New England" was given to an indefinite part of the territory within the limits of the Plymouth colony, by Charles I. then prince of Wales, at the instance of a captain Smith. This captain Smith was a principal man in the Plymouth colony, and had drawn a plan of this part of it. The extent of it appears no otherwise than by means of such and such names of places that are still current.

of

of the whole. The persons sent out to order and dispose of the settlement, were sent under *their* authority, and acted by their direction.

It was about this time, that the low church party began to feel the severities of Laud's persecution: as those severities increased, men of higher rank, and larger property, began to look out for an asylum. They applied to the company, and offered to go over to the new settlement with their families and dependents. It was now for the first time, that any part of North America began to be viewed in the light of a fixed abode. The colony till now had served to no other purpose than that of the seat of a factory, who were changed from time to time as the purposes of commerce made convenient. It now began to wear the face of a settled plantation. This new race of inhabitants, excluded from *all prospect* of a return to their *native* country, turned their eyes to this vacant region as to their home. Disdaining therefore to  
subject

subject themselves to the controul of their inferiors, and fearing to receive laws from a country groaning under the persecutions from which they were about to fly, they insisted on the custody of the charter, as the pledge of their security.

It can, I think, hardly be doubted, but that such a transfer of the charter was *illegal*; for, according to the terms of the charter, the governor, deputy-governor, and assistants were to reside and hold their courts in England. By what legal power then could the charter be transferred to a governor, deputy-governor, and assistants, who were to reside and hold their courts in America?

This difficulty was either not attended to, or over-ruled. A general assembly was called on the 29th of October, 1629. A new governor, deputy-governor, and court of assistants were chosen, out of such of the members as offered to go and settle in America. They sailed from Southampton at

at the end of March 1630, and took the charter with them.

Of that charter the following is an abridgment \* :

It begins by reciting the grant made by king James I. in 1620. " by which all the tract of land between forty and forty-eight degrees of northern latitude was granted to the Plymouth company †.

It then recites " that the council established at Plymouth, had granted to Sir Henry Rosewell, and others, that part of the premises, which is now called Massachusetts Bay. This last grant the charter confirms; and, as if for greater security, re-grants the same lands afresh directly from the king, with the usual reservation to his majesty of the fifth part of all gold or silver ore.

\* This charter is printed at the end of Mr. Mauduit's Short View of the History of Massachusetts Bay.

† This charter was explanatory of the first general charter of Virginia, cited above.

The grantees, and such persons as they should hereafter associate with them, are made a body corporate, *by the name of the governor and company of Massachusetts Bay, in New England*, with perpetual succession; a capacity of pleading and being impleaded, of purchasing lands or goods, of granting or selling them, and of using a common seal.

The charter goes on to regulate the government of the corporation. It appoints that there should be one governor, one deputy-governor, and eighteen assistants. Those who are to be the first invested with these offices, and hold them for the year ensuing, are named in the charter.

Their successors are to be chosen *annually*, by the majority of the company, out of the freemen of the company. They are to take an oath of office, and are removable for misdemeanors.

Once every *month* the governor is to assemble the court of assistants, which is, to order and dispatch all such businesses

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Once every quarter, or, if the court of assistants shall see fit, more frequently, the governor is to assemble a general court of *assistants* and *freemen*.

These general courts are to admit free-men, to elect officers, "to make laws and ordinances for the good and welfare of the company, and for the government and ordering the lands and plantations; which laws and ordinances are *not* to be *repugnant* to the laws of England."

The patentees and their associates are empowered to engage settlers, as well subjects as strangers. To employ shipping; transport armour, weapons, ordnance, ammunition, cattle, and all manner of merchandises, free of all duties for seven years.

They are likewise exempted from all subsidies *in New England*, "for the like space of *seven years*; and from all taxes and

"impositions, *for the space of twenty and*  
*"one years"* upon all goods and merchan-  
 "dises, *at any time or times hereafter*, ei-  
 "ther upon importation thither, or ex-  
 "portation from thence, into England, or

\* I can have no reason to doubt of Mr. Mau-  
 duit's accuracy. I suppose therefore this is a *true*  
 copy. The reader will, however, remark, that it  
 differs essentially from the second charter of king  
 James, cited above. There a total exemption from  
 taxes and impositions is granted for *twenty-one* years,  
 here only for seven; there five per cent. is the *per-*  
*petual* tariff after the expiration of the twenty-one  
 years, here it is the tariff after the expiration of  
*seven* years, and to continue only for twenty-one  
 years. In the first instance the king renounces all  
 right of imposing taxes for a certain consideration  
*for ever*, here he renounces it for the same con-  
 sideration, but *only for twenty and one years*. I own,  
 however, from the turn of this whole clause, it  
 looks as if the words—"for the space of twenty  
 "and one years" had crept in by some mistake of  
 the transcriber. If it had not, instead of saying "at  
 "any time or times hereafter," it should have been,  
 "at any time or times within the said twenty and  
 "one years;" and so again, after the word  
 "thenceforth" should have followed, "during  
 "the said twenty and one years."

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Sect. II. TO THE COLONIES. 117

"other of the king's dominions, except  
 "only the five pounds per centum, due for  
 "custom upon all such goods and mer-  
 "chandises as after the expiration of the  
 "said seven years shall be imported into  
 "England, or other the king's domini-  
 "nions, which five pounds per centum  
 "only, being paid, it shall *thenceforth* be  
 "lawful to export the same goods, &c.  
 "into foreign parts without any custom,  
 "&c. to be paid."

The rights of natural-born subjects *here*  
 in England, and within any of the king's  
 dominions, are preserved to the settlers and  
 their children.

In favour of those who were to settle this  
 tax, this is the whole of what was stipulated;  
 and these therefore are all the privileges to  
 which the present colonists can be under-  
 stood, under this charter, to have suc-  
 ceeded.

The governor, assistants, and freemen,  
 in England, stand on a very different foot-  
 ing; they indeed in their general courts



are empowered to make "all manner of  
"wholesome and reasonable orders and  
"laws, not contrary to the laws of Eng-  
"land." I cite the *words* as not knowing  
how to give the *sense*.

The objects of these laws are described.  
And these objects are :—to settle the forms  
and ceremonies of government and magi-  
stracy, necessary for the plantations ; to  
name and style all sorts of officers ; to di-  
stinguish and set forth the several duties,  
powers, and limits of their offices ; to pre-  
scribe forms of oaths (warrantable by the  
laws of England) for the due execution  
thereof ; to dispose and order their elec-  
tions, and to impose *lawful* fines, mulcts,  
imprisonment, or other *lawful* correction  
on the breakers of these laws.

With respect to the settlers then it should  
seem, that the charter submitted them to  
an absolute government ; for I see no limi-  
tation prescribed to the power of the coun-  
cil over them : unless it be that the power  
of taxation is not expressly given. To all  
other

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Sect. II. TO THE COLONIES. 119

other laws made and published, not by the settlers, not by a legislative body residing among them, but by a company residing *here* in England, the planters are required to pay all due obedience.

The only limitation of the power of the council is contained in these words, which follow immediately after the words empowering the council to inflict fines, mulcts, &c. "according to the course of *other corporations*, within this our realm *of England.*"

## S E C T. III.

*Abstract of the charters of Connecticut and  
Rhode Island.*

"GOD in his providence (Mr. Hutchinson very gravely remarks) "bringeth good out of evil\*." His proof is, "that it is to bigotry and blind zeal "we must attribute, if *not* the settlement, "yet at least the *present* flourishing state "of North America."

True it is that bigotry and blind zeal contributed to unpeople England, as it had to unpeople other parts of Europe; and that those who were driven by it from hence took refuge in America. Equally true it is that the same spirit of bigotry and blind zeal raged *among* the new emigrants with tenfold greater fury than it had ever raged *against* them here; that it

\* See his History of Massachusetts Bay, vol. i. p. 3.

forced

## Sect. III. TO THE COLONIES. 121

forced them afunder with greater violence than it had collected them together. They were like the men of Babel ; no man understood his brother. But bigotry and blind zeal no more contributed to render America *flourishing*, than the multiplicity of languages contribute to make men knowing.

Thus much is certain, bigotry and blind zeal brought dispersion out of union. Hence new settlements were formed, and new charters sued for.

By degrees part of these religionists fell away from the rest. Some settled upon the river Connecticut. Another part went and occupied Rhode Island. Each of these divisions bethought themselves of applying for, and found means of obtaining a separate charter \*. From that district, of which the whole had been already granted to the whole body of the adventurers under the Plymouth charter, two large

\* See Collection of Charters, No. vi. and vii.

districts were dismembered in favour of a part of that body, without the privacy of the rest. These new tribes were each of them erected into "a body corporate," and enjoined to use the powers vested in them "according to the course of other corporations within the kingdom of England."

Mean time nothing can be more striking than the difference between the situation of the adventurers under these two last charters, and that of those under the first. On the one hand exemptions were granted to the patentees of Massachusetts Bay, which were not granted to the patentees of Connecticut and Rhode Island. On the other hand more extensive powers were granted to the latter in one or two essential points.

The reason of this difference is obvious. In the charter granted to the patentees of Massachusetts Bay the king had in contemplation only a set of merchants and adventurers residing in England, and carrying

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SECT. III. TO THE COLONIES. 123

rying on by their factors and agents an exclusive trade to a certain part of America. In granting the charter to the patentees of Connecticut and Rhode Island, he had in contemplation to prescribe a form of government for a number of subjects *already settled there*.

Thus, for instance, the general court of the company of Massachusetts's bay was to consist of the governor, or deputy-governor, and such of the *assistants and freemen* as were present; that is, all the freemen had a right of being present, and voting at these courts. In Connecticut and Rhode Island, the freemen of the different towns and districts were to elect *deputies* to deliberate, and vote for them in the general courts.

To the patentees of Massachusetts's Bay, an exemption from the payment of all customs on goods exported from England was granted for the space of seven years. To the others, this exemption is expressly denied.

The

The patentees of Massachusetts Bay had no power of erecting courts of judicature. To the others this power is given.

In these charters, it is not the most sanguine advocate of the Americans that can find any thing, to justify their claim of independence on the parliament or laws of England. On the contrary, the laws of England are throughout referred to as the standard, by which the validity of their own regulations is to be tried. The legislative powers conveyed to them are to be used in the manner "that *other corporations in England* use them." And surely no corporation in England did ever suppose that their powers of subordinate legislation exempted them from the supreme legislation of parliament.

In the charter of Rhode Island we find the following clause. "Many of the inhabitants cannot in their private opinion conform to the public exercise of  
" religion

"religion according to the liturgy and  
"ceremonies of the church of England,  
"or take and subscribe the oaths and ar-  
"ticles made and established in that be-  
"half; and for that the same, by reason  
"of the remote distances of those places  
"will, as we hope, be no breach of the  
"unity and uniformity established in this  
"nation, we have therefore thought fit  
"to ordain—that no person, within the  
"said colony, shall, in any wise, be mo-  
"lest, or called in question, for any dif-  
"ferences in opinion in matter of reli-  
"gion—any law, statute, &c. of *this realm*  
"to the contrary notwithstanding."

Here then we see a specific law of *this* realm, I mean the act of uniformity, by which the colonists thought they *should* be bound, unless they had a specific *exemption*. The object of this law was such, as would render the observance of the law itself, in these uncultivated and distant regions, a matter of the greatest possible indif-



indifference to the government in England.

Supposing the English clergy to be as intolerant as the most uncandid of their enemies have ever represented them, yet here were no endowments to tempt their avarice. The scene was too remote to be galling to their pride. Few, if any, of the settlers were of the church of England. They were of various sects, no one of which but had testified its hatred to the rest. Yet even this law they thought *might* legally be put in execution against them. They felt that they were legally subject to it. And they therefore prayed a specific exemption from it. If without that specific exemption they would have been subjects to this law, why not to others?

The charter of Massachusetts Bay contains nothing more than an exclusive right of trading within a particular district of America. This right is conveyed to a  
*company*

*company* residing in England. That *company* had extensive privileges, but hardly any of the powers of political government. They had indeed the power of imposing commercial duties, but they could lay no domestic taxes, either on freemen or non-freemen. They could erect no courts. The people whom they sent out, or such of the adventurers as went of their own accord, had no other protection for their rights than what was to be found in the courts *here* in England; the same protection which a *Gentoo* may find at present. The patentees were exempted from customs and duties for a given time; but *such* an exemption so limited, is itself the strongest confirmation of the right.

Some of these defects are supplied in the charters granted to Connecticut and Rhode Island. But in neither of *these* is there expressed or implied any thing like a total emancipation from the power of  
par-

parliament, except as to the single object of conformity to the church of England: nor does any reason appear why such an emancipation should be necessary to the exercise of any power, or the enjoyment of any exemption that is there expressed.

SECT.

S E C T. IV.

*What were the privileges granted by the Crown to the New-Englanders, by the second Charter of Massachusetts Bay?*

I N the general slaughter made of corporations, toward the latter end of the reign of Charles II. the company of Massachusetts shared the common fate. It was in the year 1683, that a monster called a *quo warranto* was let loose upon them, from the court of King's Bench, to devour their privileges. And in the year following, another of the same breed, called a *scire facias*, out of the court of Chancery, to summon them to make their appearance within a month. Having neither wings to fly with, nor command over the waves to still them, they came not within the time. For this contempt judgment was entered up against them. From this time the crown saw them prostrate at its feet.

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At

At the resurrection of the constitution under king William, entreaty was used with his majesty to restore the ancient charter. The request, as to the specific terms of it, was refused. They were denied what they asked for; but, what is singular, they were granted more: a charter was granted them, in many respects more beneficial than their old one.\* It is

\* See this charter in the Appendix to Neale's History of New England, vol. ii. number I. It is reprinted in the collection printed for Almon. I could not read without surprize the following passage in a book attributed to Mr. Burke †. The writer is speaking of this colony. "Some time after the revolution (says he) they received a new charter, which, though very favourable, was much *inferior* to the extensive privileges of the former charter, which indeed were too extensive for a colony." Surely this writer had not attended to the first charter, or had forgot that it was granted to a company *residing* in England. And therefore with all its *extensive* privileges wanted all the powers necessary to constitute a political government.

† See Account of European Settlements in America, vol. ii. p. 169, edit. 5.

this

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this new charter which goes by the name of the second charter of the Massachusetts Bay.

This charter (after reciting the several charters heretofore granted to the company of Plymouth, and to the patentees of Massachusetts Bay, and the vacating of this last charter on a writ of scire facias in court of Chancery); sets out with naming as the subject of its disposal, the colony of Massachusetts Bay: to which, however, we find now, for the first time, aggregated a number of other settlements, known by the respective names of "New Plymouth; the province of Maine; the territories called Acadia, or Nova Scotia;" with the intermediate wastes.

It is remarkable, that the terms under which they stand characterised in the charter, are those of *factories*, and colonies: the first of which seems to shew the *legal* idea entertained of the settlers under the former charters. The law considered them as *factors*, or *agents*, of a

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company: the governing part of which was supposed to be fixed, and resident in England.

The "factories and colonies," thus incorporated, are not declared (as in the former charters) "a body corporate and politic, capable of pleading, and being impleaded," &c. but are erected into "one real province."—A very different kind of society, and requiring far other powers than a mere body corporate.

The affairs of the province accordingly are to be administered by a governor, deputy-governor, and secretary; all three at the nomination of the crown; by twenty-eight assistants, or counsellors, to be annually chosen by the general assemblies; and lastly, by representatives to be deputed by the respective towns and districts.

The council is to consist of the governor, or deputy-governor, and seven, at least, of the assistants.

The

The general courts, or assemblies, are to consist of the governor, or deputy-governor, the assistants, and the representatives.

With the governor is lodged the power of summoning the council, and general courts. Both, or either, as often as he sees fit. But the general courts he is obliged to summon once a year at least.

He may adjourn, prorogue, or dissolve them at his pleasure. He has a negative on all laws; as also in the election of counsellors.

He has the command of the militia *within* the province: he may erect, or demolish forts, and commit the government of them to such persons as he pleases.

These are acts in which, by the charter, he is bound only by his *own* discretion.

Other acts are not to be done but with "the advice, or consent" of the council.



It is with their "advice and consent" that he is to appoint judges, commissioners of oyer and terminer, sheriffs, justices of the peace, and other officers, belonging to the council, or courts of justice; to do all that is necessary for the probate of wills, and granting administrations; to issue his warrant for disposing of the taxes levied by the general assemblies, for the defence and support of the government, according to such acts as shall be in force within the province; and to grant commissions for exercising martial law.

It is with the general assemblies that it lies to elect annually the assistants or counsellors; and to remove them for misdemeanors; to fix the number of representatives, which each county, town, or place, is to depute: the right of voting, however, being restricted to freeholders of forty shillings a year, or men possessed of some other estate of the value of fifty pounds; to erect courts; to make all manner of "wholesome and reasonable  
" laws,

" laws, either with penalties, or without,  
 " not *repugnant* to the laws of England;"  
 to appoint annually all civil officers, except  
 those reserved to the crown, or to the go-  
 vernor as above-mentioned; to set forth  
 the several duties, powers, and limits of  
 the officers appointed by themselves; to  
 prescribe the forms of oaths to be taken  
 by such officers, such oaths, as before,  
 not to be "*repugnant* to the laws of Eng-  
 " land;" to impose " fines, mulcts, im-  
 " prisonments, and other punishments;"  
 " to impose, and levy proportionable and  
 " reasonable assessments and taxes, on the  
 " estates and persons of all the proprietors,  
 " or inhabitants of the province;" and,  
 finally, to authorize the governor, when  
 they see fit, to lead the militia out of the  
 limits of the province.

It is in the name of the king, that all  
 courts of justice are to be holden; and  
 they are to have a power of " hearing  
 " and determining, all manner of pleas,  
 " real, personal, or mixed; in causes cri-  
 " minal,

“minal or civil; on matters capital, or  
“not capital; and of awarding, and  
“making out execution thereon.”

To the inhabitants in general, are granted all the liberties of natural-born subjects within any of the king's dominions; the right of appealing to the king, in dernier resort, from any “judgment or sentence,” in any personal action, wherein the matter in difference exceeds the value of three hundred pounds sterling: to *such* of them as possess a freehold of the yearly value of forty shillings, or a personal estate of the value of fifty pounds, is granted a right of voting at the election of representatives to serve in the general assemblies; and, lastly, by an express provision, to all except Papists, a full liberty of conscience.

To the king himself are reserved, the powers of erecting courts of admiralty; of nominating the governor, lieutenant-governor, and secretary; of receiving appeals in *personal* actions; of disallowing, so it be within three years after their enactment,

actment, any laws made by the general assemblies.

From these laws, however, are excepted, such as shall be made to pass any grant of lands within the three colonies of Massachusetts's Bay, New Plymouth, and the province of Maine only. Laws for these purposes are exempted from disallowance. Finally, to the king are reserved all trees of a certain diameter; and, as in former charters, the fifth part of all gold or silver ore, and of all precious stones.

Many, we are to observe, are the powers granted in this charter, which were wanting in the former. Among others, that of levying taxes on themselves is particularly observable.

It is from this specification, whereby the power of taxation is, by the parliament, speaking through the king, communicated to the colonies, that some are forward to infer the parliament's having renounced it for itself. But this inference seems not just.

The

The circumstance of two taxing powers over the same body of persons taxable; of two taxing powers, I say; a subordinate one besides the supreme; of two such taxing powers, established for raising funds for different purposes, is by no means new. The truth is, nothing can be less so. We see it every where. Look around us any way, it stares us in the face. Not a parish in the kingdom, but has a power of taxing itself; or, to speak more accurately, not a parish in which there is not a certain body of men, the vestry, to whom within the limits of that parish, for certain purposes of that parish, belongs a power of laying taxes on the rest. Are then the persons thus taxed, are they by virtue of their being subjected to the authority of this one taxing body, exempted from the authority of every other taxing body? and in particular from the supreme universal taxing authority of parliament? No: they are again taxable by a second taxing body, viz. the vestry as above, with

two justices superadded, for certain other purposes of that parish. They are a third time taxed, if the parish be a corporation, by a third taxing body, the rulers of that corporation, for the purposes of the corporation. They are a fourth time taxed by a fourth taxing body, the justices of the county, for the purposes of the county. Lastly, they are a fifth time taxed by parliament; a fifth, and universal taxing body, for the universal purposes of the whole empire.

The inference in itself then is nothing less than just. That to king William in particular, who granted the charter, it did not appear just; that he never meant it *should* be made; that he never thought it *would* be made, is what the grantees had early, and authentic proofs of.

To himself, we may remember, the king had reserved the power of nominating the chief officers, the governor, deputy-governor, and secretary.

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The reservation, it seems, gave great offence; so much, that the agents thought it necessary to go into arguments to justify them for having accepted the charter with such a clog to it.

In the course of those arguments, the idea of exemption from parliamentary taxation is *there* broached. We shall see how it was *here* received. Consider, say they to their constituents; consider, tho' you have not those powers, how ample are these you have.

"The general court has," (by this charter) "with the king's approbation, *as much* "power in New England, as the king and "parliament have in England. They "have *all* English liberties:—can be touched by *no law*: by *no tax*, but of their "own making \*."

The province caught up the idea. Accordingly the first act of the new legisla-

\* See Neale's History of New England, vol. ii. p. 479.

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ture was (says Mr. Hutchinson \*) a sort of Magna Charta, asserting their claims, and privileges; among which this was not forgotten.

It is among the principal of these assertions, "that no aid, tax, tallage, assessments, custom, loan, benevolence, or imposition whatever, shall be laid, assessed, imposed, or levied on any of their majesties subjects, or their estates, on any pretence whatsoever, but by the act and consent of the governor, council, and representatives of the people, assembled in general court."

That the *province wished* to have the charter interpreted in the sense their agents put upon it, is abundantly apparent. Did the *king* then interpret it in that sense? We shall soon see. *He disallowed the act.* It was expressly put to him, whether that, which they wished for, was his meaning? and his answer was as expressly in the

\* See Hutchinson's History of Massachusetts Bay, vol. ii. p. 64.



negative. "Did your majesty mean to exempt us," say the representatives, "from parliamentary taxation?" Says the monarch—"No.—You the subordinate legislative body of this my province shall not be the *only* body having power to lay taxes. Others, *one* other such body at least there shall be besides." What shall be this body? The king alone? That, I trust, will hardly be maintained. If any one can find out another, besides the parliament, let him produce it.

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## S E C T. V.

*What were the privileges conveyed by the crown to the proprietor and inhabitants of Maryland in the Charter of Maryland?*

**B**ESIDES these governments, which alone are called *chartered*; there are others, which though equally derived from charters, are called *proprietary*.

These Mr. Justice Blackstone defines to be governments, "granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities and subordinate powers of legislation, which formerly belonged to the owners," as he thinks proper to call them, "of counties palatine."

The first of these proprietary governments, (or indeed of any of the colonies founded for the express purpose of settling) which was dismembered from the general

general grants of Virginia, was *Maryland*. It was granted, by a charter of the year 1632, to Cæcilius, Lord Baltimore \*, a Roman Catholic, who "was induced," we are told, "to attempt this settlement, "in hopes of enjoying liberty of conscience for himself, and securing it to such "of his friends, to whom the severity of "the laws might loosen their ties to their "mother country †."

The constitution given to the colony by this charter, is remarkably different from that of any other we have yet seen.

In the first place, the whole colony, that is, we are to understand the soil of it, is under the usual reservation of the fifth part of all gold and silver ore granted to that lord and his heirs, to be holden of the king, as of his castle of Windsor in free, and common soccage by *fealty only*.

\* Collection of Charters, No. IV.

† Account of the European Settlements in America. Vol. ii. p. 227.

Then

Then comes a clause, which seems strongly to characterise the light in which the continent of North America, as we have before intimated, had till that time been considered; I mean that of a station for *factories*, and not for settlements; a country to trade in rather than to cultivate. A special appellation is accordingly bestowed on the country granted in this charter; it is erected into a *province*, in order (says the charter) "that the country thus granted may be eminent above all other parts of the said territory, and dignified with higher titles."

It is declared in express terms to be no longer a part of Virginia, or any other colony whatever, nor dependent on them, nor subject to their laws, but entirely separated from them; to be subject to the crown of England only, and thereon to depend.

To lord Baltimore is granted the sole and absolute proprietorship, as we have already intimated, of all the lands, as also

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the patronage of the churches, saving only the faith and allegiance to, and sovereign *dominion* of the king. With the power of granting out such parcels of the premises, and that under such tenures, and for such customs and services as he sees fit, to be holden of himself *immediately*: which that they may be, every law and custom in general to the contrary, and particularly the statute of "quia emptor" is dispensed with: power is also given him to erect manors, with courts baron.

Thus much for the rights given to him as proprietor of the soil.

In his political capacity are conferred on him in general, all the temporal rights of what kind soever which "any bishop of Durham *ever had* in the bishoprick "or county palatine of Durham."

In particular, as to his legislative powers, he is to summon the freeholders or their deputies, "when, and as often, "and in such sort and form" as to him shall

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shall seem meet. And on sudden emergencies, without convoking such assembly, to him singly is given the power "of making ordinances having the force of law; provided such laws be not repugnant to the laws of England, nor extended in any sort to bind, charge, or take away the right and interest of any person in his life, members, freehold, goods or chattels." He may prescribe forms of judicature and manners of proceedings.

As to the executive power, in him it is all lodged, and he may either exercise it in person, or by deputies of any denomination. He may appoint judges to hold pleas, award and determine in all causes whatsoever. And, what is properly speaking part of the legislative, that is a dispensing, rather than a part of the executive, power, he may pardon all offences, whether *before* or after judgment \*.

\* Would the patriots of Maryland lay claim to this clause of their charter?

To him also is given the power of levying troops, with all the authority of a captain-general; the power of conferring titles of honour, provided they be not such as were then used in England; of erecting incorporate towns into boroughs, and boroughs into cities; of erecting and appointing sea-ports, harbours, and other places where *only*, goods are to be laden or unladen in the province; with the sole disposition of the customs and duties to be assessed and paid thereat.

Thus much concerning the political powers given to him singly.

Other powers he is to exercise with the advice and consent of the freeholders or their deputies: it is in general with their advice and consent that he is to exercise the power "of making any laws whatsoever, appertaining either to the *public* "state of the province, or the *private* utility of particular persons;" provided such laws be "not *repugnant* to the laws "of England;" and in particular of imposing

posing customs and subsidies on all exports and imports. Of territorial taxes all this while no mention is to be found.

To the settlers in general is granted a free power of emigration, notwithstanding the statute of fugitives; to them, and to their children born in Maryland, are preserved all the rights of natural born subjects in the kingdom of England and Ireland, with the right of exporting and importing all sorts of merchandises, the product of England or Maryland, on paying the same duties as the *rest* of the subjects of England for the time being, and *no more*: to such of them as should be freeholders, is given the power of voting, either in person or by deputy, as the proprietor should appoint, in the legislative assembly.

To himself, as we before remarked, the king has reserved the sovereign dominion, with the fifth part of all gold or silver ore.

To the subjects of England is reserved the



right of fishing on the coast of Maryland, in common with the subjects of Maryland.

As to the right of taxation, the king renounces it for himself, his heirs, and successors: and in terms which appear to me very forcible and decisive.

"We covenant (says the charter) that  
"we, our heirs and successors, will at no  
"time hereafter set, or make, or *cause* to  
"be set, *any* imposition, rate, or contri-  
"bution *whatsoever*, in and upon the  
"dwellers and inhabitants of the aforesaid  
"province for their lands, tenements,  
"goods or chattels, *within* the said pro-  
"vince, or to be *laden* or *unladen* within  
"the ports or harbours of the said pro-  
"vince." And "this declaration," as it  
is styled, "is required to be received and  
"allowed in *all* his courts as sufficient and  
"lawful discharge, acquittance, and pay-  
"ment \*."

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\* The abundans cautela of the lawyer has here, as is very apt to be the case, ended in obscurity.

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How numerous and how material the points are in which this charter differs from every other that we have examined we may now perceive. But that which is most to our purpose to remark, is the king's absolute and formal renunciation of the right of taxing: a renunciation much too important, it should seem, not to have been made, as it is here, in terminis, wheresoever it was intended it should be understood to have been made.

As to the extent of this renunciation, it depends upon the relation which the colonies were supposed to stand in to the king. What that relation was, is a question that has been the subject of much controversy.

By *this declaration*, is meant the abovementioned *clause of covenant*: and when it is said that clause shall be received as payment of a sort of debt, which by the same clause was never to become due, nothing more is meant than this; that to any prosecution on account of such a debt, this clause rendering the tax whence the debt was to accrue illegal, should be a bar; as, were the tax legal, payment would be a bar.

Before we enter upon it, it may be proper to premise, that the interpretation we are in search of for this clause, is the interpretation that according to probability was put upon it by the contracting parties, of whatever nature might have been the propositions assumed in that interpretation, whether true or false: as to this matter, it is probable, that between the sentiments of the sovereign and the noble favourite there was no great difference. The favourite, we have observed, was a Roman catholic, a disciple of that sect, whose prejudices run the strongest in favour of the power of the crown.

Charles at this time unquestionably understood himself to be in possession of the right of levying *certain* taxes by his *sole* authority, without the concurrence of the two other estates, upon his *English* subjects. If he considered the colonies as standing to him in the same relation as his English subjects, then this renunciation  
might

might be interpreted, as extending only to the right which he claimed over his English subjects, namely, the right of levying *certain* taxes without the concurrence of the other estates.

But it is likewise beyond a doubt, that Charles considered the colonies as entirely subjects to his *single* authority, and not to that of the other estates; whom he supposed to have no more right of making laws to bind them, than they now have of making laws to bind Hanover. This opinion James I. had expressly avowed in a letter to the house \*. It should seem therefore probable, that in granting this charter Charles considered the colonies as standing to him in this relation. And if so, it must, I think follow, that the covenant was *meant* and *understood*, to convey to the proprietor and inhabitants of Maryland, a full security against taxation by *any* power in England.

\* Vide infra, Sect. VII.

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This large interpretation of the clause in question, seems farther warranted by the words of the clause itself. It can hardly be said, I think, that when the king gives his consent to a tax, levied in his name, and by his authority, he does not "cause that tax to be set." And without the consent of the king a bill for taxation can no more acquire the force of a command than a bill for any other purpose. In a law for taxation, as well as in every other act of legislation, the immediate instrumentality is attributed to the king. Now the words of the clause of covenant are, that the king "will neither set, nor *cause* to be set" any tax in Maryland. Hence therefore, I think, we may conclude, that according to the strict *letter*, as well as the spirit of the charter, the inhabitants of Maryland are taxable only by their own governors and assembly; and not by another body of men, whose commands are without effect,

fect, till ratified by the authority of the king.

This last argument appears to me conclusive; nor should I scruple therefore to say, that by this charter, the proprietor and inhabitants of Maryland *were*, and supposing them to have kept their part of the contract inviolate, *still are* exempted from parliamentary taxation.

But taxation only excepted, there seems no reason to suppose but that Maryland is, in *all* other respects subject to the supreme legislative power of parliament.

The inhabitants of that colony are expressly ranked with the "*rest of the subjects* of the kingdom of England." And with respect to them in particular, three statutes at least are manifestly repealed. Two of them, the statute \* of fugitives,

\* Or rather statutes, viz. 13 Eliz. c. 3.—  
14 Eliz. c. 6.—1 James I. c. 4. sect. 8.

and

and the statute of "quia emplores" by name; and the third, "de prerogativa regia" by implication.

True it is that the repeal of the statute of fugitives was of no farther use than to secure them against the loss of their English possessions, or any other penalties that might at any time be inflicted on them *here*, for having quitted England. The operation of that statute would have been spent in England. And from hence, therefore, I allow, no argument can be drawn to prove that the settlers in Maryland considered themselves as independant on the power of parliament. But the repeal of the other two statutes was to enable them to purchase lands, to be holden *there*, in *Maryland*, directly of lord Baltimore, the immediate feoffor, and not of the king, the chief lord of the fee. It seems then, that the proprietor had no doubt but that the operation of these acts, had they not been repealed as  
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to him and his people, would have extended themselves, and reached them *there* in Maryland. Now if he was convinced that *these* acts would, unrepealed, have operated there in Maryland, it is not easy to conceive upon what grounds he could imagine that any other act of the same power might not operate there as well.

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## S E C T. VI.

*What were the privileges granted by the crown to the proprietor and inhabitants of Pennsylvania, by the charter of Pennsylvania?*

THE next of the proprietary governments in time, as well as situation, to that of Maryland, the only one indeed, besides Maryland, now remaining, is *Pennsylvania*. The grant of it made to the celebrated William Penn, the first proprietor, bears date the 28th of February, in the 33d year of Charles II. \*

The differences and resemblances between the constitution given to this colony, and the constitution given to the other proprietary colony, are such, for the most part, as might be expected from the characters and circumstances of the two proprietors.

\* See Collection of Charters, No. VII.

Both

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Both fled to America as to an asylum for their religion; but Baltimore fled from the nation; Penn from the hierarchy and the court. Baltimore looked towards the crown, as the protector of him and his tribe, against the necessary severities of the nation; Penn looked back to the affections of his fellow-subjects, as a rampart against the oppressions of the crown. Baltimore won from the favour of a steady tyrant, then in the zenith of his power, a permission of exercising in these distant regions that despotism, the image of which was alike dear to both: Penn extorted from the facility of a capricious tyrant a permission to communicate freedom to a body of fellow-sufferers, whose sighs for liberty heaved in unison with his own. Baltimore, whose spiritual prejudices fell into an easy alliance with his temporal ambition, thought a full power over the earth no more than a just recompense for his pains, in securing to them what was to give them their chance for heaven; Penn,

in the ardor of a generous enthusiasm, seems to have wished for no other power than what might suffice for the foundation of that common fabric of liberty, at which, with no other pre-eminence than that of chief labourer, he was working. Baltimore had turned his back upon a country, the majority of whose inhabitants were in a state of irreconcilable enmity with the tribe he headed ; Penn kept an eye of affection still fixed upon a country, where he hoped to find as many friends as there were persons duly sensible of the value of liberty, and resolute to defend it.

Conformable to this difference in the views of the two grantees was the drift of the charters, respectively obtained by them.

That of the Maryland charter tends throughout to mark between the mother country, if such it might be called, and this new colony, as strong a line of separation as possible ; that of the Pennsylvania charter to continue as entire as possible the  
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union between the parent and the infant state.

The above representation will appear sufficiently justified, by comparing with the Maryland charter a few of the clauses of the charter we are now about considering. To the king, but unhappily in a sense too literal; to the king, not, as in England, in the regular, independent repositories of his judicial power, the courts of Westminster-hall, but to the king, in conjunction with the feeble and invidious instrument of his prerogative, the council, is reserved the power of receiving appeals in the last resort. To the king too is reserved a negative on all laws.

By an express clause a large division of the laws, at that time in force in the mother country, are transported at once into the new colony; namely, the regulations concerning property, succession, and felonies; which regulations were to continue in force till altered by the proprietor, in  
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conjunction with the freemen, or their deputies.

To the proprietor and inhabitants, both present and to come, is granted the liberty of importing the products of the colony into England, and re-exporting them into other parts under certain regulations: one of these regulations is, that they shall pay the same duties "as the rest of the " subjects of the kingdom of England for " the time being, *shall* be bound to pay ; " and do observe the act of navigation, " and other laws in that behalf made." The duties to be paid by other subjects, might, it is clear, be fixed by laws at any time thereafter *to be* made: these duties, to be fixed by laws then future, the Pennsylvanians are to pay. It seems, therefore, but a natural construction to suppose, that by the laws mentioned in the succeeding paragraph were meant, not only laws *then* actually made, but also laws thereafter *to be* " made in that behalf."

Another

Another express stipulation is, "that all officers, and their deputies, who shall from time to time be appointed by the farmers and commissioners of his majesty's customs, for the time being, shall be admitted and received into all the ports and harbors of the province."

The proprietor is directed to maintain an agent, or attorney, in London, who is to be ready to appear in any of the king's courts in Westminster, to answer for any misdemeanors his principal may have committed, or, by wilful neglect, *permitted*, against the laws of trade and navigation; and to pay such damages as the court shall adjudge, "and answer such other forfeitures and penalties, as by the acts of parliament in England are, or *shall be* provided"

To conclude with a clause altogether decisive upon the pretensions which these colonists can found upon their charter:—the king covenants not to impose any *tax*, but

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with the *consent* of the proprietor, or chief governor, or of the assembly, *or by act of parliament* in England.

To prove, by argument, that a charter thus worded, does not withdraw the province from the supreme power of parliament, with respect to this particular matter of taxation at least, it would be an insult on the reader's understanding to attempt. The very words of the charter preclude all argument. It cannot be supposed, that any assembly of Pennsylvania could be ignorant of this; and yet one of them is not ashamed to assert, "that the taxation of the people of this province by any *other person whatsoever*, except by the representatives they annually chuse in assembly, is unconstitutional\*." So then the charter, which stipulates that they *may* be taxed by the king and parliament,

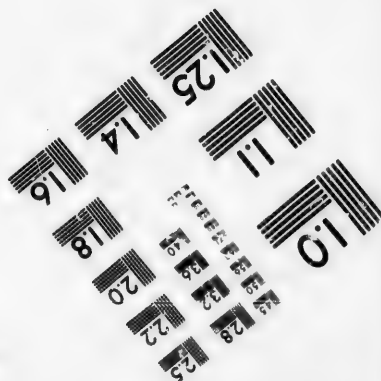
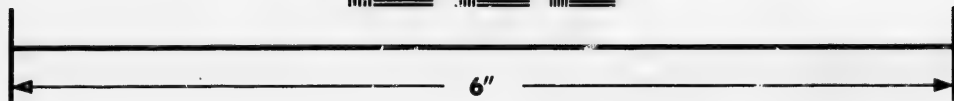
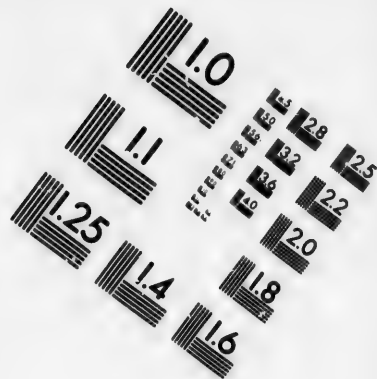
\* See the proceedings in consequence of the stamp act prefixed to the Collection of Charters, p. 10.

ment, is no longer a part of their constitution. Such is the force of "the *natural* "rights of mankind," and of "the noble "principles of English liberty," that a legislation, from it's first existence *subordinate*, becomes, notwithstanding the express terms of the instrument which forms that legislation, if not *de facto*, yet *de jure*, "*perfectly free*" and independent. For so another of their resolutions says it is "*or ought to be.*"

Upon the whole it appears, that according to the privileges originally granted by the crown to the colonies, Maryland *alone* is exempted from taxation: all the other provinces are, as to this point, in the same situation as if no charter had been granted.—The parliament may constitutionally tax them, provided the mode of taxation be such, as to create the same relation between the House of Commons and them, as between the House of Commons and the inhabitants of Great Britain.







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tain. Under such a mode of taxation they would be as effectually represented by the commons as the greater part of the inhabitants of Great Britain are represented by them.

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## S E C T. VII.

*What power did the parliament exercise over the colonies from their first establishment, to the time of the commonwealth?*

**B**EFORE we had examined into the privileges granted by the crown to the original settlers in America, we laid down some propositions very favourable to the cause of the colonists.

We supposed the king to act in the same capacity, when he \* *covenanted* with them, as when he *treats* with foreign states. We supposed charters to be acts of the same nature and force, as capitulations and treaties of peace. From thence we inferred, that the grantees have a legal right to all the powers and exemptions therein specified; and also to all other powers and

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\* This is the term used in the proprietary charters.

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exemptions *not* specified, but necessary to the enjoyment of such as *are* specified.

We have examined no less than *nine* several charters, and in *eight* of them it appears, that an exemption from the power of parliament, or from parliamentary taxation, is neither among the exemptions, or powers specifically granted, or necessary to the enjoyment, or exercise of such as are so granted.

But we went farther : we supposed a case, in which the Americans might have a right to still other powers and exemptions.—We ventured to suppose they had a constitutional right to any other powers and exemptions, which they had *constantly* and *uniformly* exercised and enjoyed, provided the legislature of England had as constantly, and uniformly, acquiesced in that exercise, and enjoyment.

Whether the exclusive power of internal legislation, and a full exemption from internal taxation, by the English parliament, be among the powers, and exemptions, uniformly

formly *enjoyed*, on the one hand, and as uniformly *allowed* on the other, can be proved only by the records of parliament.

Should it there appear, that from the establishment of the colonies, to the rise of the present troubles, parliament did no act to assert their right of controul or taxation over the Grantees \*; or having attempted any, it did at any time afterwards renounce the right; then indeed the powers and exemptions, now contended for, do fall within the description we have given, and do, according to our principles, belong of constitutional right to the colonies.

\* I use the term *Grantees* here, and not that of *Settlers*, or *Colonists*, because the original charters made, as we have already intimated, little or no provision for the liberties of any persons who could properly come under the denomination of *Settlers*, or *Colonists*. Under these charters the objects of favour were not the Ancestors of the present Americans, but either the members of a company resident in England, or merely the proprietor, and his heirs.

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If, on the other hand, it appears, that the charters were scarcely granted before parliament assumed and exercised, as far as occasion called for it, its right of controul and taxation over the Grantees and Settlers: if it appears, that in the same early period, the Grantees and Settlers appeared to Parliament, as having supreme jurisdiction over them, if they presented *petitions* to parliament, if they prayed to be *heard*, if they actually *were* heard by their council, if parliament never relinquished its jurisdiction, but asserted it even against the formidable pretensions of the Stuart family;—then surely it must follow, that neither the original Grantees *pretended*, nor the Parliament *allowed*, such powers and exemptions, to have been conveyed by the charters.

Let us turn then to the records of Parliament.

On the 12th of May, 1614, just *eight* years after the grant of the first, and five



years only, after the grant of the second charter for planting colonies in America, the company, the Virginia company as it was called, *preferred a petition* to the House of Commons. It was received and read \*.

On the 17th of the same month counsel was heard at the bar on behalf of the petitioners. The journals of that time are taken very imperfectly: however they furnish evidence enough to shew, that the matter was treated with much solemnity, and that the house was warm in the maintenance of its superintending power. We find an order made that the Lords Southampton, Sheffield, and others, who were Patentees, should be present "to hear the treaty of the Virginia business.†" At the hearing it was moved, that the Treasurer, and those of the company of Virginia, should withdraw themselves during the debate. To this it was objected; if there was a bill depending concerning

\* See Journals, vol. i. p. 481.

† See Journals, vol. i. p. 487, 4 88.

York,

York, the member for York would not withdraw, "for that it concerneth the "*Commonwealth*." A very remarkable argument; and which plainly inferred, the opinion of the members who alledged it, that Virginia was as much a part of the *state*, and of the *realm*, as any county in England. The house acquiesced in this reason.

It happened that offence was taken at something that had been urged by the counsel for the petitioners. For this he was ordered to be reprimanded, and to make his submission at the bar, but was indulged with the liberty of making it *standing*. What the part of his argument it was that gave offence, does not particularly appear; some conjecture, however, may be made of the scope of it, from the reasons assigned for their indulgence. "Though he digressed," observed the speaker, "to matters of much weight, impertinent—took upon him to censure some things, and to advise,—yet the house would not be  
"persuaded

"persuaded that he came to offend with a *high hand*." After returning thanks for the lenity of the house, the reprimanded Counsel petitioned, "that to *fill up the measure* of their grace, they would be pleased to appoint a committee to consider of the Virginia business \*."

On the 17th of April 1621, a bill was read the first time for the free liberty of fishing on the coasts of Newfoundland, Virginia, New England, and other coasts, and parts of America †.

On the same day a report was made by Sir Edward Sands, from the sub-committee to the grand committee, concerning the causes of the decay of trade.—One cause assigned was, the importation of Spanish tobacco.—The remedy proposed, was, the cultivation of tobacco in Virginia, and the Summer Islands.

The motion was again taken into consideration the next day. A debate en-

\* See Journals, vol. i. p. 489.

† See Journals, vol. i. p. 578.

fued.—Some were for an absolute prohibition of tobacco.—It was urged, that such a prohibition would totally ruin the colonists of Virginia; that the Company should at least be heard.—One of the patentees urged, that Virginia was holden of the manor of East Greenwich. And he a man who (as the Journals say) “had his interest in Virginia” was the *only* member of the house who seemed to doubt of the Power of parliament over the colonies: the other members seem to have had *no* doubt that the Parliament had a right to order the Virginians “*to pluck up all their tobacco by the roots.*”

On the 23d of the same month another *petition* from two planters in Virginia was read to the house. This too was against the importation of Spanish tobacco. The King by proclamation had ordered all tobacco shipped at Virginia, to be forfeited; the Commons voted such forfeiture illegal.

On the 25th of April, the bill for the free liberty of fishing on the coasts of America,

merica, was read a second time \*.—In the debate upon this bill it was urged by a *servant* of the crown, "that it was not fit to make any laws *here* for those countries, which as yet were not annexed to the crown." Mr. Guy, one of the patentees, urged the same idea; but it was replied on the other side: "We may make laws *here* for Virginia; for if the king give his consent to the bill passed *here*, and by the lords, this will *controul* the patent." It was added, that these colonies were not in the same predicament as Gascony, &c. for these last were *principalities* of themselves.

The bill was accordingly *committed*. It was reported on the 24th of May†, and ordered to be engrossed; and on the first of December it passed the house‡.

\* See Journals, vol. i. p. 591.

† Ibid. p. 626.

‡ Ibid. p. 654.

On the 26th of April another petition from Virginia was presented to the house and read \*. It was moved, and carried to respite the debate on it till the 29th. On that day the house was about to proceed upon this business, when "the speaker produced, and read, a letter from his majesty concerning this petition; the petition by general resolution was withdrawn †.

This is all we know of the matter from the Journals: what was the ground of this general resolution does not appear; nor with regard to the resolution itself, is it perfectly clear what we are to understand by it. The word "resolution" seems to be meant an act, a resolution of the house itself: yet the withdrawing of a petition, is an act, which, however, the concurrence of the house, to whom the petition is presented, may be necessary, is, in the

\* See Journals, vol. i. p. 691.

† See ib. p. 694.

nature of it, an act of the Petitioners themselves, *by* whom it is presented.

From such premises, the conclusion formed by a respectable writer \*, that this was a renunciation on the part of parliament of their right of cognizance over the colonies, seems rather hasty. That the withdrawing the petition was an act of the house itself, he seems to take for granted; that the ground of this withdrawing, was a consciousness of the want of right to do any thing in consequence of the petition, is another thing he seems to take for granted. 'Tis to such a consciousness he seems to impute the future inactivity of the parliament, their not "taking further cognizance of the plantations:" and *that*, "till the commencement of the civil wars." What follows immediately after, seems still more extraordinary: "upon this ground," says he, (namely upon the ground of the house taking no further

\* Pownall on the Administration of the Colonies.

cognisance of the Plantations till the time of the civil wars, meaning the wars in the time of Charles I.) "upon this ground it "was the King" (speaking of James I. predecessor of Charles) "considered the "lands as *his* demesnes, and the Colonists "as his subjects, in these his *foreign* do- "minions, not his subjects of the realm, "or state †."

What our author meant to give as the ground of James's opinion, was, I should suppose, the single transaction, whatever it was, *of*, or *in*, the house, whereby an end was put to that particular business: and it was some succeeding king, I suppose, (that is, Charles I.) by whom, if by any, such a notion must be conceived to have been entertained, as could arise from the continuance of a habit of acquiescence, from the time of that act to the time of the civil war.

† Pownal on the Administration of the Colonies, p. 50.



## Sect. VII. TO THE COLONIES. 179

For my part, I must own, I cannot well understand how it is, that from barely knowing that a petition was withdrawn, we are warranted to conclude the ground of its being withdrawn to have been a consciousness of a want of right, to proceed upon it. Especially when we find this withdrawing accompanied at the time, or succeeded within a short time afterwards, by such resolutions as in the nature of them must have been founded on the supposition of that right. The resolutions I mean, are those spoken of by this author, when he tells us that "the house came to some very strong resolutions upon the nullity of the clauses in the charters, and passed a bill for the disannulling them." These are charters granted to, and establishing the Plantations: and it seems rather extraordinary to go on in the same breath, and say that "the house took no farther cognisance of the Plantations, till the commencement of the civil wars." If

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by "no further cognifance," he means, no cognifance pofterior to thefe refolutions, it feems rather difficult to find a commencement, for the habit of acquiefcence which he infers from thence, and which he fupposes to have been the ground of fome King's opinion about the matter. If, on the other hand, by "no further cognifance," he means no cognifance pofterior to the refolution, whereby the Virginia petition was withdrawn; then his notion muft be, that the coming to ftrong refolutions, and even paffing bills upon the nullity of claufes in charters granted to the Plantations, is taking no cognifance of the Plantations. A propofition, which it feems rather difficult to fubfcribe to.

Indeed, fo far was the houfe from meaning to renounce its right of taking cognifance of the Plantations, that but one year afterwards, we find them re-afferting their jurifdiction over them. In the year 1625 they revived the bill for a free fifhery

ry. It was brought in on the 14th \*; read the second time, and committed on the 28th of February †; reported and ordered to be engrossed on the 4th ‡; read a third, and passed the house on the 7th of March §.

The King refused, it should seem, to give his consent to this bill: and we find the committee of grievances classing the restraint of the English subjects in their fishery on the coasts of America among the list of grievances ||.

At the very beginning of the next Parliament, this bill was again revived. It was read the first time on the 24th of March; read a second time, and committed on the 17th of April; reported on the 22d, and recommitted in order to give lord Baltimore time to be *heard* by his

\* See Journals, vol. i. p. 819.

† See ib. p. 825.

‡ See ib. p. 830.

§ See ib. p. 831.

|| See ib. p. 863.

council; read a third time, and past the house on the 16th of May\*.

I do not see then, in what sense it can be said, that the house did from *that* time—that is, from the time the King's letter was read by the speaker—take no *farther* cognisance of the Plantations. Surely the strong resolutions, and the particular bill referred to by this author; surely the reviving and passing this last bill in two different sessions; the hearing counsel against it, on behalf of one of the Patentees, was taking *cognisance* of them.

Thus then stood the case, previous to the civil war. The Patentees and Planters, present divers petitions to the Commons of England: they are heard by their counsel: no objection is made to the jurisdiction of the House, except by the *servants* of the crown. The Patentees, who were members of the upper house, were pre-

\* See Journals, vol. i. p. 874, 884, 886, 998.

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# SECT. VII. TO THE COLONIES. 183

sent at the debates: the Patentees who were members of the lower house, were allowed to debate, and vote: for this reason, because the matter regarded the *Common-wealth* as much as would a debate concerning any English *County*. The house declares, that laws made in Parliament, were binding in the Colonies: asserts their power of prescribing to them what products they should, or should *not* cultivate: distinguish between the Colonies and Norman possessions: and actually do pass bills, disposing of the property of the colonies.

That we do not meet with more frequent assertions of the power of the house over the colonies, is easy to be accounted for. The intermissions of parliament were frequent. When they met they had grievances of a higher nature, and which touched them more nearly, to enquire into. Their own domestic rights; their own civil, political, personal, liberty, all were attacked: all

called for the strongest, and most manly efforts to maintain them.

The acts we have already cited, are at once the plainest acknowledgements on the part of the Grantees, and the strongest assertions on the part of Parliament, that the charters were by neither understood to have conveyed the powers, and exemptions, they are now pretended to have conveyed.

SECT.

S E C T. VIII.

*What power did the Parliament exercise over the Colonies from the beginning of the Civil War to the Restoration?*

**D**URING a great part of the period comprised in this section, one or both of the Houses of Parliament assumed to themselves the *whole* power of all the three branches of the legislature; of King, Lords, and Commons. Were the present therefore a dispute between the King and the other branches of the Legislature, touching the limits of the separate powers each might respectively claim over the Colonies, all reference to ordinances past during this period would be impertinent. But the question is, what power the *whole* British Legislature, in whatever hands it be vested, may constitutionally exert over the Colonies: and to this question, I apprehend the

E C T.

the ordinances of this Parliament are pertinent and conclusive.

In the year 1643, in consequence of a petition, as it is said from one of the plantations, an ordinance was passed appointing Robert Earl of Warwick "Governor in chief, and lord high admiral of the Plantations belonging to the King in America" The powers intended to be conveyed by this ordinance seem to have been thought too extensive to be entrusted in the hands of one man. And therefore five Peers, and twelve members of the lower house, are appointed to assist the Earl. In conjunction with these Commissioners, or any four of them, the Earl is empowered to examine into the state of the Plantations; to send for papers and persons; to remove such governors and officers as they see fit; to appoint others, and to "assign over to them such part of the power and authority, in this ordinance granted to the chief Governor  
and



"and Commissioners, as he shall think  
"fit\*."

The same ordinance, a few alterations  
and additions only excepted, was from  
time to time renewed and confirmed.

In the next year another ordinance was  
past, exempting the Planters of New Eng-  
land from all duties on goods imported  
from this kingdom into New England,  
for the use, and consumption, of the inha-  
bitants themselves; and on all goods and  
merchandises of the produce of New Eng-  
land imported thence into England, "un-  
"til both *houses* should take farther order  
"therein to the *contrary* †."

In the year 1646 another ordinance was  
passed, exempting the Plantations from all  
customs, subsidies, taxation, imposition,  
or other duty, *except the Excise*; provided  
their trade was carried on in English Bot-  
toms ‡.

\* See Lord's Journals, vol. vi. p. 291.

† See ib. vol. vii. p. 75.

‡ See ib. vol. viii. p. 685.

It is then clear that the Parliament at *that* time thought they had a right to lay any tax they saw fit on the Americans. If they had not a general right to lay taxes, they could not have a right to affix certain conditions to a general exemption from taxation; much less could they have a right to adopt the particular mode of taxation prescribed by this ordinance; a mode of all the least expensive, it is true, but which is generally considered as of all the most dangerous to liberty.

In the year 1650, an act was past to prohibit all trade with Barbadoes, Virginia, Bermudas, and Anego\*.

The preamble to this act sets forth, that "in Virginia, and divers other  
"places in America, there are Colonies and  
"Plantations, which were planted *at the*  
"cost, and settled by the *people*, and by  
"the *authority* of this nation; which *are*,  
"and ought to be *subordinate* to, and de-

\* See Scobel's Acts, ch. 28.

"pendent

SECT. VIII. TO THE COLONIES. 189

"*pendent* upon, England, and *have* ever  
" since the planting thereof *been*, and *ought*  
" *to be*, *subject* to such *laws*, orders, and  
" regulations as *are*, or *shall* be made by  
" the *Parliament* of England."

This declaration is strong and pointed.  
But "no precedent (we are told \*) can be  
" drawn from this period." The reason  
assigned for this assertion is, that "the  
" Parliament acted here, not as *Legislature*,  
" but as *Sovereign*:" if therefore "the  
" King could not legally exercise such  
" powers over the Colonies, considering  
" the *inherent*, *natural*, and established  
" rights of the colonists, we may, a for-  
" tiori, doubt the rights of these powers  
" in the two houses, called *then* the Par-  
" liament, acting as *Sovereign*."

It is not perhaps at first sight easy to  
understand the distinction here intended  
between "Sovereign" and "Legislature."  
From the context only we are led to con-

\* See Administration of the Colonies, vol. i.  
p. 126.

clude, that by "Sovereign" is meant the King in his executive capacity; that is, in that capacity in which he has a power of issuing commands concerning individual actions, addressed to individual persons. But the ordinances here referred to, are commands concerning sorts of actions addressed to sorts of persons. They could not therefore, it should seem, be issued by the two Estates, as supposing themselves to stand in the place of the King in his executive capacity; but by the two Estates, as supposing themselves *alone*, and without the concurrence of the King, to be invested with the whole legislative power. On this supposition, however false, it does not appear, that the two Estates meant to assume a greater power than that which is now lodged in the three Estates, in the King, Lords, and Commons taken together. The power of the whole, taken together, is *now* the same as it was *then*. The only change effected since, is in the distribution of the distinct powers of the respective

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# Sect. VIII. TO THE COLONIES. 191

tive branches of the whole. If therefore  
 the proceedings of this Parliament may  
 not serve as "a *precedent*," they may  
 yet serve as a strong *testimony*, that it was  
 then the general opinion that the supreme  
 power of England, in *whatever hands*  
 that power was lodged, had a right of  
 making laws and levying taxes in the Co-  
 lonies. It is a proof at least, that the  
 opinion of those times was, that the Co-  
 lonies always had *been*, and ought to be,  
 subject to the laws of England, whether  
 those laws had taxation or any other object  
 in view: that the enforcement of obedience  
 to those laws was perfectly consistent with  
 the *established*\* rights of the Colonies.

\* I mention only *established* rights, because I  
 know of *no* other rights in a state of civil society.  
 The terms of *natural* and *inherent* rights, when  
 applied to men in such a state, are to my under-  
 standing, perfectly unintelligible. I may do wrong  
 perhaps in making this avowal—But such is the  
 narrowness of my capacity, that I think the *Citi-  
 zen* is to look for his *rights* in the laws of his  
 country.

Nor

Nor let it be forgot that these were the opinions of men who stand high in the estimation of the world; men whose names are delivered down to us with the endearing epithets of Champions of liberty, and defenders of the rights of mankind. "In all the annals of recorded time (says an historian, whom Freedom has marked as her own \*) never had fortune reared so tall a monument of human virtue, as were the achievements of this Assembly."—"They had recalled the wisdom and glory of ancient times."—"England bade fair to outdo, in the constitution of her government, every circumstance of glory, *wisdom*, and *felicity*, related of ancient and modern empire."—"Englishmen were on the point of enjoying a fuller measure of happiness, than had ever been the portion of human society." The opinion of men

\* M'Cauley's History of England, vol. v. p. 91.

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like these, on such a subject as this, must surely have its weight with the friends of freedom. Let it not be forgotten then, that these architects of virtue, these restorers of glory and of wisdom, these creators of human happiness, considered our colonies in America as subject in *all things* to the supreme power of England; treated them as subjects; regulated their internal rights; laid on them internal taxes.

O

SECT.

## S E C T. IX.

*What powers did the Parliament exercise over the Colonies from the Restoration to the Accession of his present Majesty?*

“AFTER the Restoration, when many of the rights of the subject, and of the constitution were *settled*, the constitution of the colonies (we are told) received their *great alteration*.” This alteration, it is added, consisted in this, “that the king participated the sovereignty of the colonies with the parliament\*.”

Thus far the author I am quoting; at the same period, according to him, the constitution of England was *settled*, that of the colonies *altered*. I must own I am not able to perceive the ground of this distinction. *Altered* perhaps is the term I

\* Administration of the Colonies, vol. i. p. 127.

might



## Sect. IX. TO THE COLONIES. 195

might prefer for both ; but if I called the one a *settlement*, I should call the other by the same name. For if it be true that before the Restoration the king refused to participate with the other estates the sovereignty over the colonies ; it is equally true, that he took more than what is now allotted to him as his share in the sovereignty over England. If it be true, that after the Restoration he consented to participate with the other estates the sovereignty over the colonies ; it is equally true, that he left the other estates in the undisturbed enjoyment of their share in the sovereignty over England. Why one of these cases should be styled "an *alteration*," and the other "a *settlement*," is, I own, more than I am able to understand.

One alteration no doubt there was.—The colonists at first appealed to the parliament, as to a protector, against the power of the crown ; and then the *servants*

of the *crown* denied the competence of parliament to interfere. Now the servants of the crown appeal to parliament as alone having the power of regulating the colonies : and lo ! the *colonists* deny the competence of parliament to interfere.

We have seen that, before the civil war, bills were carried through both houses for regulating the trade of the colonies, and for limiting their internal rights ; to these bills the king refused his consent. There were no bills for taxation, because the colonies seem to have afforded nothing taxable. During the civil wars the two estates went farther, ordinances were made for taxing the colonies ; to these the consent of the king was not asked. Since the Restoration the three estates have acted in concert, and seem to have exercised when, and as they saw fit, over the colonies, the same power which, during the civil wars, had been exercised by the lords and commons alone.

No,

Part II.

SECT. IX. TO THE COLONIES. 197

No ; we are told \*, till the present reign, "the policy of Britain towards her colonies was purely commercial ; and the commercial system wholly restrictive. "It was a system of monopoly.—That from hence alone she proposed to make "the colonies contribute ; directly, I mean, " (says the gentleman) and by the operation of her superintending legislative power, to the strength of the empire."

The gentleman ventures to say, "that from the year 1660, to the unfortunate period of 1764, a parliamentary revenue from thence was never once in contemplation. That this nation never thought of departing from this system of its own choosing, until the period immediately on the close of the last war."

I am not a very venturesome man, yet here, I think, I may *venture* to say something : I may venture to say, that gentleman

\* See Mr. Burke's speech on American taxation, p. 38, 39, 44.

men who say thus are either themselves under a mistake, or mean to lead others into one. This I may venture to say, having proof before me: the fact is not as alledged. A parliamentary revenue has been thought of often; sometimes even *raised*; raised by parliament, and quietly submitted to by the colonies. Monopoly was in some instances extended over the colonies in favour of England. True; so was it in other instances over England in favour of the colonies.

I should not have the courage to contradict an assertion made so solemnly, by such a man in such an assembly, if I were not supported by the highest authority, no less than the records of parliament.

To this authority let us appeal; let us turn to the statutes, there we shall see that few parliaments have sat since the æra of the Restoration, which have not past acts, not only for regulating the trade of the colonies, but also for ordering and limiting,

SECT. IX. TO THE COLONIES. 199

ing, their internal rights, and for *laying*  
*taxes* on them.

The navigation act \* has been so often  
cited in this controversy, that it would per-  
haps be sufficient barely to name it; but I  
would wish to observe, that the colonies  
ought not to consider it barely as a *restrictive*  
act. True it is, that it lays the co-  
lonies under certain *restrictions*; but then it  
is equally liberal in securing them *certain*  
*advantages*. Their ships are considered as  
English ships; their *mariners* as English  
mariners †. So far then as the increase of  
navigation and mariners was in contem-  
plation, the colonies participate in the be-  
nefits of this act, as fully as the English  
themselves. Considering it as a restrictive  
act, and it does more than regulate the  
trade of the colonies; for it not only pre-  
scribes in what vessels, and to what places,  
the goods of the colonies may be exported,

\* 12 Car. II. c. 18.

† 13 & 14 Car. II. c. 11. sect. 6.

but limits one of their internal rights; it prescribes what persons may act as merchants, or factors, in the colonies.

The idea of this act was borrowed from the ordinances of the long parliament, and from the acts of Cromwell. In pursuance of the same idea, three years afterwards the parliament passed another act, "to maintain," as they express themselves, "a greater correspondence and kindness between the Colonies and England, "to keep them in a firmer *dependence* on "it, to make this kingdom a staple, not "only of the commodities of the plantations, but also of the commodities of "other countries for supplying them\*."

To this purpose the act puts their trade under farther regulations, directing, that no European goods shall be *imported* into the plantations, but such as shall be shipped in *England*, and proceed directly on board

\* See 15 Car. II. c. 7.

*English* \* ships, navigated by an *English* \* master, and with three fourths at least of the crew *English* \* mariners. The penalty is forfeiture of the goods and vessel, one third to the king, one to the governor of the plantation, if the seizure is made there, and one third to the informer. And to facilitate the recovery of the penalties, the informer has his option of suing either in the king's courts of the plantation where the offence is committed, or in any court of record in England.

As a counterbalance to these restrictions, the same act grants them certain privileges in the exportation of sea coal. It confirms and increases the penalties of a former act † forbidding the plantation of *tobacco* in England, "because" says the act, "the planting of it is a discouragement to the colonies," remarking at the same time,

\* Under these terms, as we observed above, are included vessels built in the plantations, and subjects of the plantations.

† 12 Car. II. c. 34.

that

that notwithstanding the penalty imposed by the former act of *forty shillings* a rod, the planting of tobacco in England did *still continue*.—This surely was no mean sacrifice to the welfare of America, and the system of *monopoly* is not *entirely* in favor of England.

Though the penalty for planting tobacco in England or Ireland, imposed by this last act, was no less than ten pounds a rod, still the profits arising from it were so great, that this provision was insufficient to prevent the planting of it; and therefore, by another act\*, power is given to justices of the peace “to *pluck* up and utterly destroy” all tobacco planted in England or Ireland.

The legislature whilst it takes these efficacious means of securing to the colonists the monopoly of tobacco, repeats and enforces its former directions for keeping them in a *firmer dependence* on England,

\* 22 & 23 Car. II. c. 26.

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verted elsewhere than to this kingdom,  
“ which hath (says the act) and doth daily  
“ suffer great prejudice by the transporting  
“ of great number of the people thereof  
“ to the said plantations for the peopling  
“ of them.”

About three years after this, the legisla-  
ture went farther. It passed an act laying a  
tax for the purpose of *raising a revenue* †.

This act begins by allowing the impor-  
tation of train-oil, whale-fins, &c. *caught*  
and *imported* in English vessels, free of all  
customs and duties, and the importation of  
fish, &c. caught and imported in vessels  
built in the plantations, on payment of  
certain *duties* there named.

It then recites, that the liberty which  
had been granted, of transporting free of  
all duty the productions of one colony to  
another, had been abused,—that the co-  
lonists were not content with enjoying this

† 25 Car. II. c. 7.

freedom

freedom from duties on goods transported for their *own consumption*, in which they had a manifest advantage over the English, who paid large duties for the same articles, but had transported and vended large quantities of their goods to *other states* of Europe.

To prevent this, it is ordered, that security shall be given to transport all such goods directly to England, Wales, or Berwick. In default of such security a duty is imposed on certain enumerated goods, to be collected *there* in America by *officers* to be appointed by the commissioners of the customs in *England*, under the authority and direction of the lord treasurer of England, or commissioners of the treasury. The penalties to be the same as for non-payment, or defrauding his majesty of his customs in England.

It has been very justly remarked \*, that the duties imposed by this act, cannot be

\* See Controversy between Great Britain and her Colonies reviewed, p. 168.

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## Sect. IX. TO THE COLONIES. 205

considered as meant solely to *regulate* the trade, but are evidently intended to *raise a revenue*. The reasons assigned for this assertion appear to be conclusive.

The act declared, that the English subjects paid *duties* on these commodities, that the trade from one colony to another was greatly *increased*. This is at once assigning a reason *why* the trade between one colony and another could *now bear* the imposition of duties, and pointing out the *measure* of duties to be imposed; accordingly the duties imposed by this act on goods exported from one colony to another, were the same as were *then* paid on the same commodities consumed in England. These taxes therefore were *expected* to be paid, and therefore were intended to raise a revenue.

There is only *one* exception to this:—the duty on logwood carried from one colony to another, is so high as to exceed the possible profits of that trade. In this instance,

stance, therefore, and this *alone*, the tax was intended to operate as a prohibition.

The act was worded very *incorrectly*. Of two constructions, the colonists very naturally embraced that which was most favourable to themselves. They considered the payment of these duties, as a discharge from giving the securities not to go to any *foreign* market.

This clause is therefore explained by another act made in the year 1696 \*. It is there repeated, that these duties are to be paid on goods transported from one *colony* to another. And it is farther provided, that notwithstanding the payment of such duty, the same security is to be given, that the goods are to be exported only to some part of his majesty's dominions.

This explanation of the former Act affords a corroborating proof, that the duties imposed by that act were intended to raise a revenue. And as a still farther proof we

\* See 7 & 8 Will. III. c. 22.

may

may observe, that the officers to whom these duties are to be paid, are called "the officers for collecting and managing "his majesty's *revenues*." They have the same powers of visiting, searching, and entering warehouses, wharfs, &c. as the officers of the customs in England.

About this time it should seem the colonies had passed some laws to defeat or counteract some other law made here in England relating to the colonies; and therefore the last act declares, "that all "laws, bye-laws, usages or customs, at "this time, or which *hereafter* shall be in "practice in any of the said plantations, "which are in any wise *repugnant* to the "*before-mentioned* laws, or any of them, "so far as they do relate to the said plantations, or any of them, or which are "any wise repugnant to this *present* act, "or to *any other* law *hereafter* to be made "in this kingdom, so far as such laws "shall *relate to and mention* the said plantations,

"tations, are *illegal, null, and void*, to all  
"intents and purposes whatsoever."

Thus far the statute;—than which a fuller and more formal exemplification and assertion of the supremacy of parliament over the colonies, in all matters whatsoever, can hardly be imagined; and this a statute, one of the express purposes of which is the laying taxes for the purpose of a revenue.

The same act orders and limits the internal rights of the colonists; for it precludes the colonists from alienating their lands in favour of other than natural born subjects.

In the reign of queen Anne, an act\* was passed laying *rice* and *molasses* under the same prohibition of exportation to any foreign market, as the other commodities enumerated in the 25 Car. II. c. 7.

Another act was passed in the same reign, granting bounties on tar, pitch, rosin, turpentine, hemp, &c. This act

\* See 3 & 4 Anne, c. 5.

forbids all the inhabitants of New Hampshire, Massachusset's Bay, Rhode Island, &c. to cut down any pitch, pine, or tar trees, not actually inclosed, and under a certain diameter §.

This surely is not a bare regulation of trade: it is, if any thing can be, a limitation of an internal right of the colonies.

In the same reign an act was passed for ascertaining the rates of foreign coins *within* the plantations in America \*. This too is the limitation of an internal right.

The act † for the establishment of a general post-office, is clearly an act imposing duties for the purpose of raising a revenue. The subjects in America, are by this act, put under the same restraints as the subjects of England: they must send their letters by the messengers employed by *one* common post-master: must pay the

§ See 3 & 4 Anne, c. 10. 6 Anne, c. 30.

\* 6 Anne, c. 30.

† 9 Anne, c. 10.

rates ordered, and apportioned by the same legislature.

By an act in the very beginning of the reign of George I. the duties created by the 25th of Car. II. are mentioned under the title of "Plantation Duties," and are ordered to be paid into the Exchequer, and *appropriated* to purposes prescribed by this act \*.

Another act passed in the same reign †, for the purpose of encouraging the importation of naval stores, is equally applicable to our purpose. Among the variety of regulations in it, some favouring the colonies, are others laying restrictions on them, and that in matters of internal œconomy.

It grants a bounty upon the importation of hemp: directs that the pre-emption of it be tendered to the commissioners of the navy: allows the importer to dispose of it as he pleases, if they do not contract

\* 1 Geo. I. stat. 2. c. 12. f. 4.

† 8 Geo. I. c. 12.



for it within twenty days: it grants a bounty on wood, plank, timber, and lumber. It regulates the conditions on which the bounty granted by an act of Queen Anne to the importation of pitch and tar, should be payable. It multiplies, and extends, the prohibitions concerning cutting down, or destroying white pine-trees. By the act of the ninth of Queen Anne, already mentioned, white pine-trees of a certain *dimension* only, were included in the prohibition: by this act it is forbid to cut them down *generally*. By the act of Queen Anne, trees being the property of any private person, were excluded from the prohibition; by this act, such trees only are excepted "as grow within any *township*, or the bounds, lines, and limits thereof."

By another act of the same reign \*, it is ordered that all furs, exported from the

\* 8 Geo. I. c. 15.

plantations, shall be imported directly to Great Britain, and not elsewhere.

By another act, copper ore is subjected to the same regulation †.

In the reign of George the Second an act was passed †, by which the preservation of pine-trees in the plantations, is still farther provided for \*.

By another act || all rice in general is again declared to be among the enumerated commodities, which are to pay a tax on being transported from colony to colony, and which cannot be carried directly to any foreign market. The act then establishes an exception to this *general* rule; and allows that "any of his majesty's  
" subjects, in any ship or vessel, *built* in  
" *Great Britain*, or belonging to any of

† 8 Geo. I. c. 18.

† 2 Geo. II. c. 35.

\* On the other hand, that favour might go hand in hand with restriction, premiums are renewed or extended to the importation of masts, yards, tar, pitch, &c. from the plantations.

|| 3 Geo. II. c. 28.

" his

“ his majesty’s subjects *residing* in Great Britain, navigated according to law, and “ having cleared outward in any port of “ Great Britain for the province of Carolina, may ship rice in the said province, “ and carry the same directly to any part “ of Europe to the southward of Cape Finisterre.”

Another act \* of the same reign permits the importation of all non-enumerated goods from the plantations to Ireland. Hops were among the non-enumerated goods. Clearly, therefore, by the terms of this act, a right was given to the Americans to import hops of their own growth into Ireland. But this was not the intention. In the next sessions, therefore, an act was passed, ranging hops among the enumerated goods †.

The

\* 4 Geo. II. c. 15.

† 5 Geo. II. c. 29. The title is—“ An act “ to explain, and amend an act, intituled an act “ for importing from his majesty’s plantations in “ America,

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The same parliament, and in the same sessions, exercises two of the highest acts of

“ America, goods not enumerated in any *act*, so far as the said *act* relates to the importation of foreign hops into Ireland.”

I cite this only to shew what pains are taken to give awkward, and (what is worse) *untrue* titles to our acts. For the act said to be explained, is not at all explained. An exception only is made by the second act to a general permission granted in the first. The matter concerning which, the act is said to be explained, is not once mentioned in the original act.

In the body of this explanatory act, it is said, “ that *doubts* had arisen whether the liberty of importing hops was not given in the former act.” Now *no doubt* could arise. The liberty was as clearly given as words could give it. *All* goods, *not* enumerated, *might* be imported. Hops were *not* enumerated.

This is only one, out of many instances I could cite, of this inaccuracy in the composition of first laws; and of something worse than inaccuracy in the manner of supplying omissions, or rectifying mistakes in them.

Had the second act candidly declared that the legislature had not recollected that hops were *not* among the enumerated goods:—had it allowed the importation

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of internal legislation. In one and the same law it alters the *nature* of evidence in their courts of common law; and it alters the nature of their estates, by treating real estates as chattels.

The preamble of this act declares "that his majesty's subjects trading to the plantations, lie under great difficulties, for want of more easy methods of proving, recovering, and levying of debts due to them, than are now used in some of the said plantations."—It declares the remedying of these inconveniencies neces-

importation of such of them to Ireland as should be shipt before the second act could be duly notified: had it then classed hops among the enumerated goods for the future, the legislature would have spoken a language becoming its own gravity, and dignity. But to call that an explanation, which was only the supply of an omission; to suppose a doubt, where no doubt could arise; to insinuate a censure on the understandings of those, to whom the command was addressed; when *all* the censure, if any, was due to the carelessness of those who issued the command; betrays a levity and puerility, that too often disgrace the legislature.

fary to *retrieve* the credit formerly given by the inhabitants of Great Britain to the inhabitants of the plantations †.

From this preamble alone we might fairly have concluded, that the subordinate legislatures in America must have been apprised of these inconveniences, and had either refused, or at least neglected to provide an adequate remedy.

But, indeed, we have more positive proof that this was really the case. The bill was brought in, in consequence of repeated petitions from the merchants of England. They set forth, that by the *laws* then in force in the plantations, the British subjects had none, or at least but a precarious remedy for the recovery of their just debts. They set forth, that the same laws had laid partial duties on the British subjects trading *there*; duties higher than those paid by the inhabitants of the colonies ‡.

† 5 Geo. II. c. 7.

‡ See Comm. Journ. vol. xxi. p. 794.

What

What the provincial legislatures would not, or at least did not do, parliament did for them,

To facilitate the proof of debts, it enacted, that an affidavit taken before the mayor, or other chief magistrate of any town in England, and properly authenticated, should be received as legal evidence in all the courts in the plantations, and have the same force, and effect, as the personal oath of the plaintiff made *there* in open court.

To facilitate the recovery, and levying of debts, it enacts, "that lands, houses, negroes, other hereditaments, and all *real estates* whatever, should be *liable* to, *chargeable* with, all debts due either to the king, or any of his subjects, and be *assets* for the satisfaction thereof; in the same manner, as, by the law of England, *real estates* are liable to the satisfaction of debts, due by bond, or other *speciality*."

In

What

In the same sessions, parliament thought proper to prohibit absolutely, and under heavy penalties of fine and confiscation, the exportation of hats from the plantations : either from one plantation to another, or to any *other* place whatsoever †.

The same act fixes the number of apprentices that each manufacturer of hats may have ; the time each manufacturer is to serve as apprentice, before he can make hats ; and prohibits the employment of negroes in hat-making, under a penalty of five pounds a month for each negro so employed.

The same parliament, which thus precluded the plantations from one branch of trade, favoured them in another. An act was past the same sessions, to encourage the growth of coffee in the plantations ‡. The inland duties on all coffee imported from the plantations, are diminished by *one fourth*. And provision is made against

† 5 Geo. II. c. 22.

‡ 5 Geo. II. c. 24.



the importation of foreign coffee into the plantations.

In the next sessions an act was past "for the better securing, and encouraging of the trade of his majesty's *sugar* colonies in America §."

This act imposes certain *duties* on all foreign spirits, molasses, syrups, sugar, and panels, imported into the plantations.

The duties are to be levied, and paid, for the use of his majesty, his heirs, and successors.

The act uses the technical words of "give, and grant."

Here then at least, one would think, was clearly a duty imposed for the purpose of *raising* a revenue.

Other acts (we have seen) *have* imposed duties for the same purpose. But (says a certain gentleman\*) "the words which distinguish revenue laws specifically as such, had been, he thinks, *premeditatedly*

§ 6 Geo. II. c. 13.

\* See Mr. Burke's Speech, p. 39.

"avoided."

the

“*avoided*.”—If there be such emphasis in these words, that the avoiding them every where was matter of design; here then we cannot help concluding they were *pre-meditately used*.

No, says the same gentleman. For look at the title of the act. If the title of the act, indeed, had purported taxation, it would have been quite a different affair. But “the title of this act, notwithstanding “the words of donation, considers it “merely as a regulation of trade.”—So then parliament is at liberty to be as bountiful as it pleases in *acts* of donation, out of the goods of the Americans, provided it do not use *terms* of donation: or it may even use *terms* of donation in the preamble, or in the body of the act, provided the title of it, be a title of regulation.—So then the stamp act would have been good, and constitutional, provided Mr. Grenville had bethought himself to intitle it “an act “to regulate the transfer of property in  
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### SECT. IX. TO THE COLONIES. 221

"his majesty's colonies and plantations in  
"America."

But farther—"This act" (we are told)  
"was made on a *compromise* of *all*; and  
"at the *express desire* of *some* of the colo-  
nies. It was therefore in some measure"—  
mark the consequence—"with *their con-*  
"*sent*."—It was then with *their* consent,  
that the commons—did what?—*gave* and  
*granted*, one should suppose, a duty to be  
levied on the colonists.—No—says this  
gentleman, though there was an *act* of do-  
nation—though there were the *terms* of  
donation; still it was *no* donation. For "it  
"was an act of prohibition, not of reve-  
"nue."—Should we suspect the accuracy  
of this honourable writer, we are referred  
to "the second printed letter of Governor  
"Bernard, dated in 1763."

This care to mark the *date* of the letter,  
was "*I think premeditated*."—It was meant  
to insinuate, that governor Bernard, *then*,  
in the year 1763, considered it as an act  
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of prohibition: yet certainly the governor does not say so.—He gives it only as his *opinion*, that it was “*originally designed*” as an act of prohibition.

But another passage in the same letter of the governor, will give us to understand whether the act was intended to operate merely as an act of prohibition; or whether it was not intended to operate in some measure also as an act of revenue. Let us hear his words:—“at the time of making the act, (says he) it was asserted by the West Indians, that as the British West Indian plantations were capable of taking off all the produce of North America, the sending such produce to foreign plantations ought to be discouraged.—To this the North Americans then answered, by denying (I believe with greater truth) that the British West Indian plantations *were* capable of taking off all the produce of North America, fit for the West Indian market.”

This

This account sets the matter clear. The act was intended to operate as an act of *prohibition*, so far as to secure a pre-emption of North American productions to the British West Indian plantations. It was intended to operate as an act of revenue upon all imports taken in exchange for the rest of their produce sold to foreign West-Indian islands, after the British West-Indian markets were supplied.

Remark too how fully the *consent* of the colonies is implied in this *compromise* of all, and *express desire* of some. Those who "*compromise*," flatly deny the positions on which the act was past. Page after page in the Journals is filled with their objections to the principle of the act, and with their prayers against its passing. Those who "*desire*" the act, are those who are not to pay a shilling of the taxes it imposes.

Is this the compromise, this the desire, which constitutes consent?

To the list of acts already referred to, I might add that \* which restrains the Americans from creating banks; the acts † which give the rights of *natural-born* subjects in America, to foreign Protestants, to the United Brethren, and to Jews. The act which imposes a *duty* of six pence a month on all the British American sailors, towards the support of Greenwich hospital ‡. The act which grants a premium on indico imported from the plantations §. The act allowing the free importation of raw silk from thence ||. The acts allowing the free importation of pig and bar-iron, and for preventing the erection of any mill, or other engine for sitting or rolling iron; or plating forges worked with a tilt hammer; or furnaces for mak-

\* 14 Geo. II. c. 37.

† 13 Geo. II. c. 7. & 20 Geo. II. c. 44. & 21 Geo. II. c. 30.

‡ 18 Geo. II. c. 31.

§ 21 Geo. II. c. 30.

|| 23 Geo. II. c. 20.

ing steel in the colonies \*. The act which repeals all duties on the importation of pot and pearl ashes from America †. The act restraining the governors and assemblies of the respective provinces, from making any act, order, resolution, or vote, whereby paper bills, or bills of credit, shall be created or issued, under any pretence whatever; or for protracting, or postponing the times limited, or the provisions made, for calling in such as were then actually issued, and subsisting ‡. The act which extends to the colonies certain provisions of the statute against frauds §. The act which dissolves the indentures of servants enlisting in his majesty's service.

But why should I multiply examples? Why accumulate proofs in a matter so clear? From the acts already cited it is

\* 23 Geo. II. c. 29. & 30 Geo. II. c. 16.

† 24 Geo. II. c. 51.

‡ 24 Geo. II. c. 53.

§ 25 Geo. II. c. 6.

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evident,

evident, beyond a doubt, that the original patentees did not consider themselves as withdrawn from the power of parliament:—that parliament has at no time considered itself as precluded from exercising any act of its supreme authority over the colonies: that it has constantly exercised the *same* authority over them as over the *other* subjects of the realm: that, in establishing its system of monopoly, it has alternately exerted,—at one time its fostering care, to secure advantages to them:—at the same time, or at another, its restrictive power, to secure advantages to the mother-country: that where the acts of their subordinate legislatures have either omitted to secure, or attempted to break the chain, which keeps them dependent on the mother-country, parliament has itself added, or replaced, the links; the want of which would have broken the connection and dependence, by prescribing new arrangements, and by setting new bounds to their *internal* rights, privileges, and properties:



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### Sect. IX. TO THE COLONIES. 227

ties :—that where encouragement was necessary to secure, or extend their trade, parliament has bestowed it with a liberal hand :—that where the increase, and flourishing state of their trade, enabled them to repay, in part at least, what the mother-country had thus liberally advanced; the same parliament, acting as a faithful steward for the whole empire, has without hesitation, apportioned the quota they should pay.

As, therefore, the exemptions, now claimed by the colonists, are neither specifically named in their charters; nor necessary to the exercise and enjoyment of such exemptions and powers as are named: so neither are they such, as have been either constantly enjoyed and exercised by them, or ever allowed them by the parliament.

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SECT.

## S E C T. X.

*Of the deference paid by the colonies to the authority of Parliament, and to the requisitions of the Crown, previous to the reign of his present Majesty.*

SUCH of the acts of the last parliament, as concern the present question, were acts passed for enforcing submission to a claim asserted by the parliament preceding. The policy of the acts then must, in a great measure, depend upon the policy of the claim.

If that claim was unconstitutional, it unquestionably, upon that account, was impolitic. In such case these last acts must be regarded as impolitic. But it might also, without being unconstitutional, be impolitic on other grounds: in this case too they still could not but be regarded as impolitic.

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If the right of supremacy in general had never been *claimed* till the commencement of the present contest, the claim made at so late a period, might with reason be condemned as novel and unconstitutional. If having long ago been exercised or claimed, it had all along been *contested*, it might at least be looked upon as doubtful. If for a long continuance it had been claimed and exercised, and the colonies had *contentedly* submitted to it, till manifested in the particular article of internal taxation; the exercise of it in such particular article might be open to censure, though not as unconstitutional, yet as impolitic. If not confining their reluctance to this particular *mode* of exerting it, or this particular *time* of its being exerted, they have gone on in a middle way, between open contestation, and contented obedience, the exerting of it in the particular mode, and at the particular time in question, should seem to have nothing in it

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it impolitic, any more than unconstitutional.

It was with a view to the constitutionality of the acts we are about to review, that we cited so many acts of preceding parliaments, to shew that parliament had always exercised its supreme power over the colonies ; putting forth more or less of that power, as seemed necessary to the ends of protecting them ; of maintaining their dependence on the mother-country ; of making them contribute, in proportion as they were able, to the common necessities of the whole empire.

It is with a view to the policy of these acts, that it becomes of importance to enter into the question, how the colonies have conducted themselves under the exertion of this power ; whether they have *contested* the right of exercising it ; or *contentedly* submitted to it ; or whether they have not rather taken a middle way ; *eluding* the acts of authority, in which  
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the right has been exercised, without disputing the right itself.

By way of answer to this question we are told, that as to the navigation act (for to that alone the gentleman chuses to confine himself) "its authority *never* was "disputed; that it was no where disputed for any length of time; and on the "whole, that it was *well* observed. When- "ever the act pressed hard, many *indi-* "viduals indeed evaded it. But this (he "says) is nothing \*."

Hence I suppose we are to understand that the opposition made to it was made in no other way than that of unsystematical evasion; and, that of whatever nature it was, it was carried on by none but individuals; that it never had the colour of authority. That the assemblies themselves maintained a constant deference to it, is not indeed expressly *said*, but this I suppose it was designed should be *inferred*

\* Burke's Speech, p. 43.

from the emphatic mention of *individuals*.

What truth there is in this representation the Journals of the House of Commons will inform us. From them we learn\* that so early as the year 1701, impediments were thrown in the way of the king's officers; combinations were formed against those who had the courage to execute the trusts reposed in them with fidelity; that the administration of justice was delayed, and the greatest unwillingness expressed to submit to any exercise of the supremacy of the mother-country, and in particular to the acts of *trade and navigation*.

At that early period a commission for enquiring into great irregularities and misdemeanors in Rhode Island was rendered ineffectual. Lord Bellamont was sent out on this commission, "but found

\* Vol. xiii, p. 502, 503, 504, 505. The particulars are minutely stated; they were too long to insert here.

"(says the commissioners in their report to the house) such an opposition to his majesty's authority, and the acts of trade and navigation, that no good effects could be obtained from that commission: they (the people of Rhode Island) pretending by their charter to be *independent on the government of England.*"

The province of Connecticut was, in its corporate capacity, equally refractory. "The governor and superior court pre-emptorily and publicly declared they would admit of no appeals from them to his majesty in council." This was neither more nor less than saying, that they would admit no appeals *at all* to England: for however unconstitutional, as well as inefficacious this mode of appeal may be, compared to others that might be established, to declare they would not admit this, at a time when no other was established, was to declare that they would admit none. What chance in such case

the inhabitants of the mother-country would have for justice in their disputes with those of the colonies, is easy to be imagined.

Even then the commissioners of trade represented to the house, "that speedy and " effectual care should be taken to render " the colonies more subservient and useful " to this kingdom."—That this might be done "by the legislative power of this " kingdom," is what the commissioners seem to have had no doubt of; though they conceived it could not be effected by any other means.

In another report, delivered in the beginning of the next year \*, it is again alleged against both Proprietary and Charter Governments, "that they had not " complied with what had been demand- " ed of them in reference to *trade*, or with " what might be necessary for the com- " mon safety; that they had not con-

\* See Commons Journals, vol. xiii, p. 729.

" formed



“formed themselves to the *acts* of parliament for regulating trade and navigation: that several of the Governors in the Proprietary Governments had not applied to his Majesty for his approbation, nor taken the oaths required by the acts of trade: that they had made *laws* contrary and repugnant to the laws of England.” And the commissioners go so far as to recommend it to parliament to resume the charters.

It is however true, that till the æra of the Stamp Act the colonies did not directly, and in the *face* of parliament, deny the power of parliament to pass laws, which should bind them. The laws passed by the colonial legislatures, though in some instances really repugnant to the laws of England, were not so much direct denials of that power, as modifications of the provisions made by it. They shewed a tendency which should have been carefully watched, and as carefully checked, to worm themselves out of obedience,

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dience, but they did not formally disclaim it.

Read the petition presented by the agent of Massachusetts Bay against the salutary acts for restraining the emission of a paper currency, and the creation of banks \*, and you would scarcely suppose but that so late as this the power of parliament to regulate the internal rights of the colony was not only not contested, but cheerfully acquiesced in. On the other hand, if you believe the representation given of the proceedings there by the committee that sat upon these acts, you cannot but perceive that the colonial legislatures were as ready to embrace every contrivance for counteracting the effect of those statutes, as they were remote from any idea of contesting the right to make them.

Read the petition of Richard Partridge, agent for Rhode Island and Providence

\* 14 Geo. II. See Commons Journals, vol. xxiii. p. 527, 528, 645.

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Plantation, against passing another of the many acts which parliament has found it necessary to pass for restraining paper bills of credit in North America. What said this agent? Did he call in question the right of parliament to make this regulation? Was it on any pretended exemption from parliamentary authority that he grounded his objections to the bill? No such thing. All he ventured to do was to apply himself to the equity of parliament, by insinuating that the provisions of the bill were contrary to the privileges of the colony. Nor was he wanting in his endeavours to conciliate the favour of the house, by alledging, "the punctual and ready obedience the colony had shewn to the pleasure of the Crown, and of *the house* \*." This was in the year 1751.

It was in the same year, and in reference to the same act, that Mr. Bollan,

\* A. D. 1751. See Commons Journals, vol. xxvi. p. 159.

agent for Massachusetts Bay, presented a petition to the House. In this petition indeed Mr. Bollan ventures to give a gentle intimation of a certain something, a certain natural and lawful right, derived, we are to conclude, from a certain law of nature, which is to be a controul on Parliament in the exercise of the acts of authority he complains of. He apprehends, "that the province has a *natural* and *lawful* right to make use of its credit for its defence and preservation \*."

Though the language here holden by Mr. Bolan is in a strain rather more lofty than the commons had been used to, yet as he spoke for his *own* province only; as no leagues, no associations, no congress was formed; as no threats were thrown out, the style was overlooked.

Many more instances might have been mentioned, to shew that the obstacles thrown in the way of the operation of the trade

\* Commons Journals, p. 206, 207.

laws in particular, and in short that the symptoms of disaffection to the supremacy of the mother-country in general, were not unconnected acts of private individuals, but were acts of the people at large; that instead of being punished as often as found out, they were in many instances protected by their courts of justice, and sanctified by their legislature. Many more instances to this purpose might, I say, have been mentioned: but as they are already mentioned by Dr. Tucker \*, I may content myself with referring to his book. What I have here confined myself to, are such as seem to have escaped the notice of that gentleman.

The other point to be enquired into, is the deference paid by the colonies to the requisitions of the crown. These requisitions have for their object the contributions demanded of the colonies, either for extraordinary services in time of war, or

\* See the beginning of his Fourth Tract,

for the ordinary support of their own civil government in time of peace.

On this head we find it with great vehemence asserted, that till the fatal period of 1764, the colonies were ever ready to contribute as far as their abilities would permit.

On the first point, that of contributions for extraordinary services, we are referred to the most respectable authorities, to messages sent by their late and present majesties, and to resolutions taken in consequence of those messages by the British House of Commons.

In these messages the King sets forth the *zeal* of his subjects in America; and recommends it to the house to recompense that zeal. In compliance with this recommendation large sums were actually granted by the house.

Much stress is laid on this testimony; nor will I lessen it by remarking that in these *rare* acts of chearful contribution, the zeal exerted by the colonies had for  
its

its immediate object, their *own* immediate benefit, and advantage\*. Yet thus much I may be allowed to say:—that one or two instances do not prove an habitual disposition to contribute to the public burthens. I may be allowed to say, that the proof given of these one or two instances, concludes rather stronger in favour of parliament than in favour of the colonies. It proves, if you will, that the colonies did for once exert themselves: it proves that *they said* they had exerted themselves beyond their strength: but surely it proves too that the parliament was ready to assist them—it proves, not that the parliament *said* that it assisted them, but it proves that it actually *did* assist them li-

\* For the proofs of this, and a full refutation of the disingenuous assertions of Dr. Franklyn and Mr. Dickenson—"That the Colonies had no particular concern or interest in the last war"—"Nay that the acquisitions made by it were a hurt to the colonies,"—see Acts of their own Assemblies cited in the Controversy reviewed, from p. 107 to p. 137.

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berally. Whether they had exerted themselves beyond their strength, stands on record as a matter of *opinion*. That they were recompensed stands upon record as a matter of fact.

As to the second point, that of contributions for the ordinary support of their own civil government in time of peace, instead of proofs we have only assertions. If assertions are to weigh, those of Mr. Pownall will surely be allowed their weight. Let us then hear what he says on the matter; to his testimony no sober American can object.

He tells us, that the order of the crown to require a permanent support for the governor, "is generally, if not universally, rejected by the colonial legislatures \*." He tells us, "that the support of the governors, judges, and officers of the crown, is withheld or reduced, whenever the assemblies *suppose* they have

\* See Administration of the Colonies, vol. I. p. 80, 81.



"reason to disapprove the nomination, the persons, or the conduct of these officers."—Is this the liberal support of their civil government we hear so much of? To support a government is to preserve it in a state of strength and activity: what strength, what activity can there be in that government where the executive and judicial powers are so cramped and fettered, and depend for a scanty subsistence on the arbitrary and annual grants of a popular assembly?

Mr. Pownall, in the words we have cited, was speaking of the general and ordinary mode of providing for the support of the civil government in the colonies. He thought it not necessary it should seem, to cite particular proofs of an assertion confirmed by daily experience. But we know of one remarkable instance which should not be passed over. Single acts of extraordinary exertion have, we have seen, been cited as triumphant proofs in favour of

the colonies. It will not then be too much to presume, that single acts of obstinate refusal, may militate with some little force against them.

In the year 1710, the assembly of New York refused, on some pretext or other, to make the usual grants for the support of government. This was in a time of *war*, of the most expensive war that England till then had ever waged. At that time the councils of this nation were guided by a whig ministry. What did the ministry do on this refusal? They ordered a bill to be drawn up for raising the same taxes, and appropriating them to the same purposes by authority of parliament, as it appeared to them ought to have been raised and appropriated by the assembly of New York. The title of the bill was "An act for granting a revenue to her majesty, to arise within the province of New York, in America, for the support of that government." In the preamble of the bill  
it

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it is said the Commons "give and grant  
"unto her majesty the rates, duties, ex-  
"cises, impositions," &c. therein after  
mentioned\*.

This bill (which would have been  
brought in had the *whig* ministry conti-  
nued) was deferred to another year by the  
*tory* ministry, who succeeded at that criti-  
cal moment. It was deferred, as it seems,  
on the liberal promises which the colonies  
made of promoting the expedition then  
fitting out against Canada. An expedition  
which failed, as the author of *The Con-*  
*troversy* reviewed, informs us, on the  
authority of Swift, "partly by the acci-  
"dents of a storm, and partly by the *stub-*  
*"bornness and treachery of some in that*  
*"colony, for whose relief and at whose in-*

\* See a copy of this bill (which was signed and  
approved by Sir Edward Northey, and Sir Ro-  
bert Raymond) in *The Controversy* reviewed,  
p. 185.

"*treaty* it was in some measure de-  
signed."

But though the bill was deferred, there appears little reason to doubt, but that it would have been brought in, if the colony, grown wiser, had not renewed the grant.

Yet this very colony can now tell us, "that it has *always* been the sense of the government at home, that such grants cannot be constitutionally made \*." This certainly was not at that time the sense of government.

Yet their agent can tell us, "that a parliamentary revenue was never *once* in contemplation, till the unfortunate period of 1764†.

Had I the powers of his eloquence, or the privilege of *his* fame, I might—but I would not,—use his own harsh phrase.—I might—but I would not—say, "Thus have I disposed of this *falsehood*;" and

\* See resolutions of the Assembly of New-York, in the year 1765.

† See his Speech, p. 39.

when

Sect. X. TO THE COLONIES. 247

when I come to the unfortunate period of 1764, then too I might add—"but falsehood has a perennial spring \*."

Let us now turn to this unfortunate period.

\* See his Speech, p. 55.

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SECT.

when

## S E C T. XL.

*Of the conduct of parliament with reference to the colonies from the beginning of the present reign to the commencement of the last parliament.*

“THE grand manœuvre in the business of new regulating the colonies (we are told) was the 15th act of the fourth of George III. which opened a *new* principle; and here (it is added) properly began the *second* period of the policy of this country with regard to the colonies, by which the scheme of a regular parliamentary revenue, was adopted in theory, and settled in practice\*.”

There is, I think, a capital mistake in this representation. Hurried on by the impetuosity of his genius, this writer did not stop to mark out the several periods of

\* See Burke's Speech, p. 50.

distinct systems of policy, which had preceded, and which, by a natural progression, led to and prepared the way for the system established by the act he censures. The object with him being to represent this act as a system of as much innovation as possible; the number of periods he makes is but *two*. To me it seems, that with full as much reason *four* distinguishable periods may be marked out, at each of which the policy, on this behalf pursued, received a considerable degree of alteration.

The first period I would distinguish begins at the foundation of the colonies, and ends at the Commonwealth parliament. The sole object of the system adopted and adhered to during this whole period, seems to have been to secure to the colonies the monopoly of tobacco, and to prevent them from gaining that of the fishery.

The second period began in the time of the long parliament; but was more fully developed after the Restoration. The sole object

object of the policy, during this period, was to oblige the colonies to buy from Great Britain only, all the manufactures and European goods in general which she could supply them with; and to sell all the products they could sell to the British dominions.

On the other hand, during this second period, by way of compensation for these restraints, the monopoly given to the colonies, at first in the single article of tobacco, was extended, or at least advantages nearly equal to a monopoly were granted, in a multitude of other articles; among which we find those of rice, hemp, raw silk, pitch, tar, turpentine, indigo, and naval stores.

The third period began in the sixth of George the second, during which, in particular instances, taxation was substituted in the room of a monopoly.

This period then, which began in the reign of George III. and which the orator has chosen to style the second period, might,



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Sect. XI. TO THE COLONIES. 251

might, with rather more propriety it should seem, be styled the fourth; and the change of system then adopted, if indeed it must be called a change, seems to have been just as gradual as any of the former.

At the beginning of what I would wish to call the second period, the legislature saw that the trade of the colonies was grown an object of importance; that it was of the utmost consequence so to regulate that trade that the profits thereof might finally center in Great Britain, and be applied to the benefit of the whole empire \*. Without asking the *consent* of the colonies, they therefore established the system of monopoly.

At the beginning of the third period, the legislature saw, that the colonies had increased and flourished under the system of monopoly; that the monopoly in some instances could not be entire, because we had not markets to take off all their com-

\* See Bernard's fifth letter.

modities,

modities, nor funds to supply all their wants; and that the colonies were now in a situation to contribute by a revenue for the liberty of relaxing the monopoly in these instances. In these instances, therefore, without asking the consent of the colonies, the legislature substituted taxation, manifest direct taxation, in place of a monopoly.

At the beginning of the fourth period, the legislature saw that the colonies still increased and flourished, that they were in a situation to contribute more largely to the share of the public burthens, greatly increased on their account. The legislature therefore went on, by a natural and regular gradation, to assess the portion of the public burthens, which they now should bear. In this change it is true, the legislature did not ask the consent of the colonies. As far was it from asking their consent in the preceding changes.

I am speaking of a change, but the great change was not in the policy of the mother-ther-

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ation of the colonies; they were effectual-  
ly and finally delivered from their ene-  
mies; the sword, that from the first hour  
of their birth had hung over their heads,  
was broken; they now made a vow of in-  
dependence, the moment that maintaining  
it seemed practicable, and that dependence  
was no longer necessary.

The technical terms of *give* and *grant*  
had been used before, in the act of  
George the second. The same terms are  
used in this\*; but there is this difference.  
—In that act the title was foreign, in this  
correspondent, to the *purview*. This sure-  
ly can be no objection to the latter. It  
declares it expedient, that “new provi-  
“sions and regulations should be esta-  
“blished for improving the revenue of  
“the kingdom, and securing the naviga-  
“tion and commerce between Great Bri-  
“tain and America.” It assigns the rea-  
son why *new* regulations were expedient;  
because “the dominions in America had

\* 4 Geo. III. c. 15.

“been

“been so happily enlarged:”—this surely is no objection to the act. It declares it to be just and necessary “that a revenue should be raised in America:” it assigns the grounds of this position, and the use to be made of the revenue so raised; namely, “defraying the expences of defending, protecting, and securing the dominions so acquired and enlarged.”—Is this any objection to the act? It declares, that the commons “were desirous in the “then sessions of parliament to make *some* “provision towards raising this revenue.”—I should have thought even *this* no great objection to the act. We are told, however, that “from these last words it appeared to the colonies, that this act was “but a *beginning of sorrows*; that *every* “session was to produce something of the “same kind; that we were to go on from “day to day in charging them with such “duties as we pleased for such a military “force as we should think proper\*.”

\* Mr. Burke's Speech, p. 51.

Thus

Part II.

—this surely declares it to be a revenue "it assigns and the use of it; name—of defend—g the domi—argued."—Is It declares, sious in the o make *some* is revenue." *this* no great e told, how— words it ap— this act was ; that *every* thing of the o go on from m with such ch a military proper\*."

Thus

Sect. XI. TO THE COLONIES. 255

Thus appeared it to this orator; to me, to any one, who deigned to read the statute-book, and who chose to speak of it, it must appear at the utmost but a *continuation* of sorrows.

All these dreadful phantoms, however, appeared to the colonists:—all were conjured up by these seemingly innocent, but magic words:—“some provision”—“present session”—Alas! who can answer for the wildness of an American imagination.

There was a time when every laundress, every poor negroe wench in New England started up an enchantress; formidable as the evoker of Samuel at Endor; when old men outdid the wonders of the magicians of Pharoah; and dæmons stalked about at noon day.—The paroxysms of religious madness are now over: a political phrenzy has succeeded. Instead of witches and dæmons, their imagination is now terrified with the grim spectres of slaves,

slaves, " shaking their uncombed locks; and stamping their wooden shoes \*.

In this, as in the former case, the phrenzy, " like some epidemical disease, " has run through the whole country : "— now, as well as then, " the magistrates " and ministers, whose prudence ought to " have been employed in healing this distemper, and assuaging its fury, throw " in new combustible matter †."

The truth, however is, that the commencement of the fears and alarms which the Americans are *now* supposed to have felt upon the passing of this act was subsequent ‡; for though they remonstrated;

\* See Farmer's Letters, p. 24.

† See Account of European Settlements in America; part vii. c. 4. Hutchinson's History of Massachusetts Bay, vol. ii. p. 15, & seq.

‡ This act passed in April, 1764, the stamp act in March 1765. It is only from the time of the Americans receiving account of the passing of the stamp act, that a strenuous American dates " the great " murmurings and discontents that arose among them."

frated, and with reason, against some of the provisions of this act, they at that time did not so much as argue against the principle \*. They conceived, and endeavoured to shew, that the power of parliament had been impolitically exercised; but they did not *yet* go so far as to say, that the power itself was unconstitutional.

I do not mean to defend all the provisions of this act.—I am ready to allow, on the authority of governor Bernard, that the duty it imposed on foreign molasses was higher than it ought to have been †. I am disposed to allow, on the same authority, that a distinction ought

them. See Proceedings of the Colonies in consequence of the Stamp Act, prefixed to the Characters,

\* They touched it, Mr. Burke acknowledges, very tenderly, Speech, p. 52.

† The act imposed three pence per gallon on foreign molasses, governor Bernard thinks three half-pence or two pence at most should be imposed. See the Governor's fifth letter,

to have been established, if indeed it be *practicable*, between the different sorts of lumber; that if policy and a regard to our naval establishment made it necessary to restrain the exportation of that sort which is used in ship-building to our own dominions, we should have allowed them to export the other sort to foreigners, such as staves, or what was fit only for house-building\*. I believe, on the same authority, that proper regulations were not made for fixing the place where the courts of admiralty were to be holden: that the mode of paying the judges of the admiralty was exceedingly wrong†: and tended to warp their judgment almost against the force of evidence. I believe on the

\* This restraint is in part taken off by 3 Geo. III. c. 45.

† They are paid by a poundage on of the condemnation money. These two last named arrangements make no part of the act in question: but that act, which began this new system, ought to have corrected such capital defects.

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SECT. XI. TO THE COLONIES.

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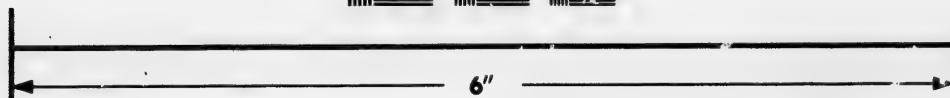
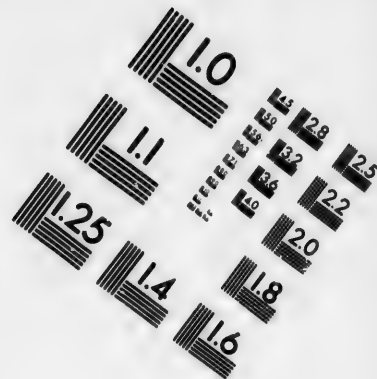
same authority, that the order to send *all* the money arising from these duties to his Majesty's Exchequer in England, was a very imprudent one; that the charges of double remittance, and the stopping of the circulation of such a sum for so long a time in America, was an addition of near one-fourth to the burthen to be borne by the Colonists, and that without answering any one *good* purpose.

I am ready to allow that these capital mistakes at the very first outset in this new period, did not only justify the colonists in the petition they presented to the House of Commons on this occasion, but would have entitled them to be heard with attention and favour, had they proposed to raise by their own assemblies a permanent revenue, always to bear a certain adequate proportion with what the subjects in Great Britain should pay. Or had they humbly petitioned to have the liberty of sending to the British Parliament a certain number of knights and

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burgesses





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burghesses to represent the condition of the colonies \*.

That the ministry were disposed to listen to either of these propositions is clear from the most indisputable authority.— That the colonies were averse to both, is clear from the same authority.

In a letter from Mr. Grenville to Mr. Pownall †, he expresses himself in the following strong and pointed terms:

\* As the great object here to be considered in the conduct of parliament toward the colonies since the accession of his present majesty, is the steps parliament has taken to assert its right of internal taxation in the colonies, I pass over the acts made for encouraging the communication and trade with the mother-country, such as 4 Geo. III. c. 26. granting a bounty on hemp and flax. 4 Geo. III. c. 27. granting a liberty of exporting rice from South Carolina and Georgia, to any part of America southward of those colonies; and to any part of Europe to the southward of Cape Finisterre. 4 Geo. III. c. 29. for the encouragement of the whale fishery. 5 Geo. III. c. 45. for encouraging the trade of the colonies, &c. &c.

† See Appendix to the Administration of the Colonies, No. I.

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“ As to the great question of our par-  
liament’s granting to America a com-  
petent number of representatives to sit  
in our House of Commons, *you are no*  
stranger to the declarations I *repeatedly*  
made in the House, at the time when  
the repeal of the Stamp Act was agitat-  
ed:—that if such an application should  
be properly made by the colonies to  
parliament, in the same manner as those  
which were made from Chester and  
Durham, and probably from Wales, it  
would in my opinion be intitled to the  
most serious and *favourable* considera-  
tion. But I am much afraid that nei-  
ther the people of Great Britain nor  
those of America are sufficiently ap-  
prised of the danger which threatens  
both from the present state of things,  
to adopt a measure to which both the  
one and the other seem indisposed. Some  
of the *colonies*, in their address to the  
crown against some late acts of parlia-  
ment have, if I mistake not, *expressly dis-*

"*dained* it; and I do not *think* it has been  
 "*kindly* received in Great Britain \*."

This was a fact which could not have escaped the knowledge of a celebrated orator. Yet in his account of Mr. Grenville's administration he did not find it convenient to remember it. To speak the *whole* truth may sometimes hurt a cause.

But it was easier for a minister to insure success to the other proposal, "That the Colonies should be allowed to tax themselves on requisition."—This therefore Mr. Grenville not only proposed, but warmly recommended to the colonies.

The design of laying on a Stamp Duty was announced in parliament so early as the month of March 1764. The House came to a resolution on the *propriety* and *possible* expediency of such a tax. But the

\* The reader will attend to the difference marked by Mr. Grenville as to the manner in which this notion was received in Great Britain and the colonies. By her he thinks it was *not kindly* received; by them it was *expressly disdained*.

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passing this resolution into an act was de-  
ferred with the *express purpose* of allowing  
the colonies time to propose any other  
mode of taxation equally productive. The  
agents of the colonies conferred with  
Mr. Grenville *separately* on this subject.  
They conferred with him on it in a body.  
He told them, what one of them at least  
declares he had heard Mr. Grenville say  
in the House,—“ That the war had found  
“ us *seventy*, and left us more than a  
“ *hundred and forty millions* in debt:—  
“ that the American civil and military  
“ establishment after the peace of Aix la  
“ Chapelle was only *seventy thousand*  
“ *pounds* a year, but was now increased  
“ to *three hundred and fifty thousand*.—  
“ That this was a great additional ex-  
“ pence incurred on the *American ac-*  
“ *count*.—That he did not expect the co-  
“ lonies to raise the *whole*; but some part  
“ of it he thought they ought to raise.  
“ That he judged this method of raising  
“ the money the easiest and most equit-  
S 4 “ able:



“able:—that it was a tax which would  
“fall only on property, would be collect-  
“ed by the fewest officers, and would be  
“equally spread over North America and  
“the West Indies, so that *all* would bear  
“their share of the public burthen. That  
“he was not however *set* upon this tax;  
“if the Americans disliked it, and pre-  
“ferred *any other* method of raising the  
“money *themselves*, he should be content.”  
He directed the agents “to write to their  
“several colonies, and if they chose *any*  
“other mode he should be satisfied, pro-  
“vided the money was raised.” Nay he  
even went so far as “*warmly* to recom-  
“mend to them the making *grants* by  
“their *own assemblies*, as the most *expe-*  
“*dient* for themselves on several ac-  
“counts.”

The colonies were accordingly written to.—But the proposal was by most of them rejected with scorn.—The offer they said amounted to no more than this—  
“That if the colonies will not tax them-  
“selves

Part II.

SECT. XI. TO THE COLONIES. 265

"selves as they may be directed, parliament will do it for them."—The very proposal, which, as we have seen before, the whig ministry of Queen Anne not only made, but effectually enforced.—The colonies directed their agents to "*remonstrate* against these measures, and "to *prevent* the imposition of any farther "duties or *taxes* in the colonies." Even yet however they did not directly call in question the power of parliament to tax them.

These facts are advanced on the authority of three of the then agents of the Colonies\*.

Yet

\* Mr. Mauduit, Mr. Montague, and the then agent for Georgia, I think it was Mr. Knox.— See a letter signed by Mr. Mauduit, in the *Gazeteer* of February 22, 1775. See also *Review of the Controversy between Great Britain and her Colonies*, p. 198. This pamphlet was published in the year 1769. And Mr. Burke's speech was made in 1774. Dr. Franklyn, in his examination before the House of Commons when the repeal of the stamp act was in contemplation, said, "that  
" he

Yet it has been boldly asserted in the house "That this fact was neither *true* nor *possible*:" "that Mr. Grenville never could have proposed that the Colonies should tax themselves on requisition:" — "that the colony-agents had no general powers to consent to such a proposal:" "that they had no

"he had it in instruction from the assembly of the colony he lived in, to assure the ministry, that as they *always had done*, so they should always think it their duty to grant such aids to the crown as were *suitable to their circumstances and abilities*, whenever called upon for the purpose in the usual constitutional manner." And that he had communicated that "instruction to the minister *before* the stamp act was brought in." So then there is another authority to prove that the colonies *were* apprised of the design of the ministry to obtain a larger revenue from America; that some proposal *had* been made them about raising that revenue in their own assemblies. And that those who called themselves well *affected* colonies past no vote, no resolution about it, offered no specific sum, proposed no medium of fixing the proportion they should bear of the public burthen, but kept only to general terms, which secured nothing to England, obliged themselves to nothing.

"time

"time to consult their assemblies for particular powers \*."

It is clear, however, that he *did* make the proposal; that the colonies had time to be consulted; that they *were* consulted; that some of them absolutely rejected the proposal: the others would give no precise answer to it.

I will not pay a worse compliment to a member of the House of Commons than he paid to his brother members. From any common writer these misrepresentations might have been supposed to be "circulated abroad with a malignant intention; but I cannot attribute a malignant intention to him who said the same thing in the house †."

Upon this refusal of the colonies the Stamp Act was passed.

While it was depending, petitions were presented against it by four of the colonies. These petitions, for the first time,

\* See Burke's Speech, p. 53.

† *Ib.* p. 53.

called directly in question the power of parliament to impose taxes on the colonies.

Nothing is more common than to reject motions \* for receiving petitions against bills; more particularly when the prin-

\* I opened the Journals, and in a single session in the reign of William III. I find no less than seven motions for receiving petitions rejected:—petitions too from bodies, many of them, without disparagement to the colonies, as respectable as the colonies of Rhode Island, Connecticut, Virginia, and Carolina. One from merchants trading to New England, New York, and Pennsylvania, touching the duties on whale-fins from the said colonies. *Com. Journ.* vol. xii. p. 336. One from the town of Altcarr in Lancashire, *ib.* p. 146. One relating to a bill for granting certain duties on coal and culm, *ib.* 240. Another on the same subject, *ib.* p. 246. Another on the same subject, by people who set forth that they had advanced 564,700*l.* on the credit of a former act, *ib.* p. 248. One from the county of Northumberland, relating to copper money, *ib.* p. 254. Another from merchants trading to Scotland, relating to duties laid on Scotch linen, *ib.* p. 336. There is scarce a session of parliament where motions for receiving petitions do not pass in the negative.

ciple of the bills has been already discussed: still more when the objections against them are drawn from topics which the house will not allow to be brought in question. It could hardly be expected, I suppose, that the house would allow the supreme authority of parliament, or the extent of their power, to be canvassed by counsel at their bar.—Yet what cannot a great genius effect? By force of the single word “*scornfully*,” this rejection of petitions has been branded as inequitable and unparliamentary.\* This act, it is true, was followed by great disturbances in America; disturbances which by the accounts we have of them seem to have been of a nature amply to justify the phrases made use of in the resolution of the house on the 17th of December 1765, which stigmatised them by the title of “outrageous tumults and infurrections;” as “a resistance given

\* Burke's Speech, p. 56.

“ by

"by open and rebellious force:" disturbances the complexion of which seems not improperly summed up in the strong expressions used by general Gage, in his letter written on the 4th of November of the same year: "that all from the highest to the lowest were necessary to this insurrection," in the threats "to plunder and murder those who should take the stamps \*."

Some we are told have said, that "all the disturbances in America were created by the repeal of the Stamp Act." But the falsehood, baseness, and absurdity of this assertion† has raised such a tumult of indignation in the breast of the great orator, as would have torn a common man to pieces.—With submission however, the mistake is all his own. No man ever meant to attribute a precedent

\* The reader may see an ample account of these disturbances prefixed to the Collection of Charters, printed for Almon.

† Mr. Burke's Speech, p. 67.

“disturbance to a subsequent measure:” no man ever thought that the disturbances previous to the repeal of the Stamp Act were caused by that repeal. But many have thought, and continue to think that the timid repeal of that act did cause all the disturbances that have succeeded. And however violent were the disturbances caused by the Stamp Act, they were not of a nature to be lasting; they might easily have been quelled.—And had they been quelled, the disturbances which have since happened, and which are of a much more alarming nature, had been effectually prevented.—Instead of which the appearance of weakness and timidity did, as it was foretold it would, bring on farther insults. For the first of these assertions there is as respectable authority as the bare word even of this orator. The protest of no fewer than two and thirty peers against the repeal. A protest which the noble lords entered, among other reasons, because “they were convinced from the unani-  
 “mous



"mous testimony of the governors and  
 "other officers of the crown in America,  
 "that though by a most unhappy delay  
 "and neglect to provide for the due exe-  
 "cution of the law, and arming the go-  
 "vernment there with proper orders and  
 "powers, these disturbances had been  
 "continued and encreased; yet they might  
 "have been easily quieted before they at-  
 "tained to any dangerous height.

It appears farther from a letter to Mr.  
 Secretary Conway, laid before the house,  
 and printed in the parliamentary debates\*,  
 "that when the Boston mob, raised first by  
 "the instigation of the principal inhabi-  
 "tants, allured by plunder, rose inortly  
 "after of their own accord; people then  
 "began to be terrified at the spirit they  
 "had raised: that each individual feared  
 "he might be the next victim to their  
 "rapacity; that the same fears spread  
 "through the other provinces; and that

\* Vol. v. p. 91. 92.

"as much pains were *then* taken to prevent the insurrections of the people as *before* to excite them."

Upon this authority surely one may be allowed to believe that the disturbances caused by the stamp act were not of so dangerous a nature as the disturbances which have happened since the repeal of the stamp act.

Nor can I—no, though I should have the misfortune to be ranked with Dr. Tucker, among "the vermin of court reporters\*" I cannot—help thinking "that the objections made *here*, both *in* and *out* of parliament, to the stamp act at the time of its passing," whatever effect they might be intended to have, had in the event that of "encouraging the Americans to their resistance."—I have not access to "all the papers which loaded the table of the house." I did not hear "the vast crowd of verbal witnesses

\* Mr. Burke's Speech, p. 71.

T

"that

"that appeared at their bar\*." But I have, I think, a tolerable proof that this idea is founded.

In the account of these disturbances, referred to above†, I see the Americans were diligent in informing themselves how their opposition was looked upon in the mother-country. I see that on the 18th of September, near two months before general Gage's letter was written, a committee was appointed at Boston, "to draw up, and transmit to Mr. Conway and colonel Barre, addresses of thanks for their *patriotic* speeches in parliament in favour of the rights and privileges of the colonists; and to desire correct copies thereof to be placed among their most precious archives." I learn too from the same account "that they voted the pictures of these gentlemen to be placed in their town-hall." This seems

\* Mr. Burke's Speech, p. 71.

† See the account prefixed to the Charters, p. 7.

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 d at Boston,  
 to Mr. Con-  
 addressees of  
 speeches in  
 the rights and  
 and to desire  
 placed among  
 "I learn too  
 at they voted  
 gentlemen to be  
 "This seems  
 to the Charters,

a com-

Sect. XI. TO THE COLONIES. 275

a compliment rather extraordinary than  
 otherwise; to be paid to speakers in "so  
 "languid a debate," to orators "who  
 "spoke with so great a reserve, and so  
 "remarkable a temper\*"

I do not know how this gentleman's  
 "excellent and honourable friends" took  
 the compliment paid to their languor.  
 —A compliment himself appears seldom  
 to have been ambitious of obtaining:  
 though it has seemed at times as if a little  
 more *reserve*, and a little more *temper*,  
 might have done him no disservice.

Had he possessed this temper and re-  
 serve, he might have spared to his own  
 delicacy the pain of uttering, and to the  
 delicacy of his auditors the pain of hear-  
 ing another *incartade*. "The agents  
 "and distributors of falsehoods, says he,  
 "have with their usual industry circulated  
 "another *lie*, of the same nature with the  
 "former. It is this, that the disturban-

\* Mr. Burke's Speech, p. 71, 72.

“ces arose from the *account* which had  
“been *received* in America of the *change*  
“of the ministry.”—“But it does so-  
“happen that the falsity of this circula-  
“tion is (like the rest) demonstrated by  
“indisputable dates and records.”—“So  
“little was the change *known* in America,  
“that the letters of the governors, giving  
“an account of these disturbances, long  
“after they had arrived at their highest  
“pitch, were all directed to the old mi-  
“nistry.\*”

It would be too much to expect that any one man should unite every excellence. It is wonderful enough that to so impetuous a genius this great man should unite a degree of coolness sufficient to keep to chronological order; to superadd exactness in relation would be too much for mortal man to do. The fact is, no man ever supposed that the disturbances arose from the account of a *change actually*

\* Burke's Speech, p. 72, 73.

made:

Part II.

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made:

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*made*: no man could suppose the disturb-  
ances committed in April and May, could  
originate from the certain knowledge of a  
change, which did not happen till July.  
Though Dr. Johnson is willing to sup-  
pose the Highlanders *may* be gifted with  
a second sight, no man is inclined to think  
the Americans are so highly favoured.  
But a strong *expectation* of a change, soon  
likely to happen, will sometimes produce  
nearly the same effect as the account of a  
change already *happened*. Now the down-  
fal of the then ministry was most certain-  
ly expected, strongly expected, by many  
people in England, long before these dis-  
turbances began; long before the act,  
which gave birth to them, was past. The  
addresses of the letters from our governors,  
so much insisted on by our orator, do not,  
I suppose, disprove the existence of this  
opinion. And it seems very probable, that  
this opinion and expectation did augment  
and prolong the disturbances.

Consider the situation of affairs both here and in America, at the time the stamp act was past, and there will appear no great reason to wonder at its meeting with resistance: the wonder would have been, had it met with acquiescence.

The disappointment given by the peace to those sanguine expectations that had been generated by the successes of the war: the encrease of taxes, consequent upon the encrease of debt: the unpopular nature of one tax in particular, which it had been thought necessary to hazard: the multiplied prosecutions of a popular champion: all these circumstances put together had accumulated such a pressing body of discontent, as could not but appear more than sufficient to bear down any ministry.

In this untoward conjuncture it was that Mr. Grenville proposed, and the legislature past, the first act for granting duties to be raised in the colonies of America.



rica. In this untoward conjuncture it was, that the resolution on which the stamp act was grounded past in the house of commons.

We have already noticed the change effected in the situation of the colonies. Of their reluctance to submit to the laws of trade and navigation; of their disposition to contest the authority that imposed them, we had seen many proofs: but this disposition, how early soever it had been kindled, and how often soever it had flashed out in occasional acts of disaffection, had been damped, and kept from running into acts or pretensions of steady opposition, by the sense of their weakness and their wants. Those wants ceasing, and that weakness being outgrown, it is not to be wondered at that they greedily laid hold of that opportunity, which presented itself, of strengthening their force by the accession of a body of makecontents in the mother-country.



The watch-word given by these malecontents, they eagerly caught and spread abroad: a general plan of despotism, as these malecontents believed, or wished to have believed, had been formed, and was pursuing: and of this plan the supposed new and unheard-of project of taxing America was invieghed against as a part, That this had been the language, both within doors and without, no body can be ignorant: that the Americans were blind to the assistance they might derive from a body thus openly espousing their interests, and leaguuing themselves on their side, is what no body can suppose: that they should be disposed to wish, and forward to expect, the downfall of a ministry who opposed their pretensions; and the exaltation of one that stood engaged to favour them, is what no body can doubt: that they should fail to perceive that acts of outrage, manifesting their disaffection, must contribute to the event they wished for, can hardly be supposed,

Part II.

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SECT. XI. TO THE COLONIES. 281

supposed. The utmost stretch that political charity can make, is to hope that those Englishmen who encouraged the opposition of the Americans, by the espousal of their cause, did not wish to see any more mischief done, any more outrages committed, than what might be necessary to bring about a revolution, according to their notions so desirable: and that there might be some among them, who, desirable as this revolution seemed to them, might not think it worth purchasing at *any* price. Among these last, let us hope to find our orator.

Be this as it may, thus much is indisputable, that the Americans expected a change of ministry; and that it was the hope of contributing to a change, promising to be so favourable to their pretensions, that encouraged them, if not to begin, at least to persevere in their resistance.

The expectation was fulfilled. A change of the ministry—from what cause is not material, did accordingly take place.

The

The short period of the succeeding administration deserves a particular attention, and happily no administration ever possessed a better historian, or a more able apologist, had an apologist been wanting to a minister, "who sought no apology \*".

This gentleman, "whose situation, he tells us, enabled him to see as well as", and whose discernment we cannot but believe, enabled him to perceive much better than "others, what was going on, "did see in the noble lord who then presided at the treasury, such sound principles, such an enlargement of mind, such "clear and sagacious sense, and such unshaken fortitude," as might well give room to hope, that if the empire could be saved, it must be by his hand. To the gods, and to the citizens of London, it seemed otherwise†.

The

\* Mr. Burke's Speech, p. 64.

\* Ib. p. 57.

† See their address presented to the King on the

The situation in which the noble lord stood at this moment was, no doubt, "a trying one;"—but it was surely a more favourable one than that in which his predecessor had stood. A great part of the ill humour, arising from domestic causes, had subsided. The minds of the people at home were in a great measure quieted. The marquis, and his friends, stood clear of the odium of unpopular measures. The city of London only excepted, the rest of the nation was prepossessed in their favor. The man, whose sufferings had excited the strongest popular discontent, and whose talents were nicely calculated to put him at the head of a faction, was ready to sue for pardon; as he did afterwards sue for pardon to a great man who was then an

the 25th of August 1765. In which they say,  
 "that whenever a *happy establishment* of public  
 "measures shall present a *favourable* occasion, they  
 "will be ready to exert their utmost abilities in  
 "support of such wise councils, as *apparently* tend  
 "to render his majesty's reign happy and glo-  
 "rious."

associate,

associate, and afterwards successor to the noble marquis.

This then was as favourable a moment as could well be hoped for ; not merely to *declare* but to vindicate, and establish on a permanent foundation, the rights of the British parliament.

There are three points on which the Americans pretended, that the ministry had grossly misunderstood, or wantonly sacrificed the interests of the colonies : their commercial regulations, the suppression of their paper money, and passing the stamp act. These then were the objects which demanded the immediate attention of the marquis.

As to the first of them, a scrupulous attention to treaties with foreign states, and a partial attachment to the letter of the navigation acts, had, it should seem, misled his predecessor. The noble marquis we are told, " saw his way clear before him :  
 " though, on the one hand, treaties and  
 " public law ; on the other, the act of na-  
 " vigation,

"vigation, and the whole corps of trade laws, were drawn up in array against him; he knew "in substance," that they were not directly against him. But he did not choose to "determine rashly," he chose to know as much "formally and "officially." By way of form then the attorney general's opinion was asked; that once obtained, "the noble marquis immediately dispatched orders for the redress of these grievances." Orders, it should seem, which, among other good effects, prevented the total ruin which was threatened of the Spanish trade.

Here then, one would think, was a vast fund of popularity acquired in America: an acquisition, one would have hoped, that might have done "knight's service;" might have conciliated the opinions and affections of men\*.

As to the second of these objects, the regulation of the paper money of the co-

\* *Ib.* p. 61.

lonies, this business was left by the noble marquis as he found it.

On the conclusion of the Spanish business, the noble marquis turned himself to the consideration of the third of these objects, the stamp act. And "after weighing the matter as its difficulties and importance required," determined on the repeal of it. And here it is, that the panegyrist of this ministry puts forth the full strength of his amazing powers.—"A partial repeal, a modification, might have satisfied a timid, unsystematic, procrastinating ministry:" but the noble lord, and his friends, were not actuated "by a weak and undecided mind:—by a majority that will redeem all acts ever done by majorities in parliament, in the teeth of all the old mercenary Swiss, in defiance of the whole embattled legion of veteran pensioners;—steadily looking in the face that glaring and dazzling influence, at which the eyes of eagles oft blenched; looking in the face .

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# SECT. XI. TO THE COLONIES. 287

“face one of the ablest, and not most  
 “scrupulous oppositions;” and what is  
 more than that, “even looking lord Chat-  
 ham in the face;” whilst earth below  
 “shook, heaven above menaced, and all  
 “the elements of ministerial safety were  
 “dissolved;”—they fought; they con-  
 “quered; they preserved the authority  
 “of Great Britain; they preserved the  
 “equity of Great Britain; they made the  
 “declaratory act; they repealed the stamp  
 “act.”

My bosom burned within me as I listen-  
 ed to the orator,—“involuntary burst of  
 “gratitude and transport,” broke from  
 me; I wondered only how the authority  
 of Great Britain, having been thus mira-  
 culously *preserved*, should all at once be *lost*  
 again.

I turned to the statute book: I found  
 the repealing act as full as words could  
 make it. I examined the declaratory act,

\* See Speech from p. 60 to p. 66.



and it is indeed a *declaratory act*. It preserved the authority of Great Britain. How? By declaring it to be preserved. What else does it? Just nothing.—It exacts no recognition of that authority. It prescribes no means of enforcing it. What a victory! what dangers surmounted! what giants vanquished! I hope the orator will forgive me; but I could not help exclaiming with lord Grizzle to Dollalolla,

I tell you, madam, it is all a trick,  
He made the giants first, and then he  
killed them\*.

At best the noble lord mistook the object of his attack. He thought all was done when he had out-talked and out-voted “an unscrupulous opposition:” this was done, but was nothing that ought to have been done procrastinated? Was it “systematic” wholly to take away the

\* Tragedy of Tragedies, or the History of Tom Thumb.

tax,

tax, and declare our right to lay it? to tear up a tree which if watered might have "yielded fruit," for no other purpose than to "plant what was called in "America a barren yew, casting a noxious "shade over the colonies \*?" Was it not timid to assert at home a right, of which he dared not exact a recognition on the other side the Atlantic? Is not leaving every thing to be decided hereafter, to procrastinate? This vaunted act "of *spirit* "and *fortitude*:"—"of supreme magnanimity," what was it after all, more than the unmeaning rhodomantade of ambassadors, who style their masters kings of France, or of Jerusalem? these titles do not secure a foot of land; the declaratory act does not secure an atom of authority.

If the colonies had objected to the stamp act on principles of expediency, on mere commercial principles, it might have

\* See Farmer's Letters, p. 77.

been altered; the oppressive provisions, if any such there were, or even the whole act, might have been safely repealed. But the colonies now objected to it on very different principles: they denied the rights of the parliament to tax them. To repeal the bill absolutely, totally, and unconditionally, was therefore to give up that right. To say that such a repeal was grounded on commercial principles, was it not nugatory? To assert the right in parliament, without insisting on a recognition of that right in the colonies; without insisting even on the poor satisfaction of a rescission of the colonial resolves against the right, was this the act "of spirit and fortitude" so much boasted of?

What was he to do then? Give up the right? This would be "cutting indeed the Gordian knot:"—though hardly "with a sword:" not much "in the heroic style\*." To yield requires little

\* See Mr. Burke's Speech, p. 60, 61.

heroism. If the knot was to be cut by yielding, the scissars of a trembling spinster might have done the work as well.

Was he to enforce the act by fire and sword? I cannot persuade myself that fire and sword would have been necessary. But I would suppose the noble marquis and his friends to have been actuated by greater views. I would suppose them to have been anxious to follow the dictates of that "equity, by which we are bound "as much as possible to extend the spirit "and benefit of the British constitution to "every part of the British dominions \*." This indeed *would* have been an object worthy of such a man as the noble lord's panegyrist has described him. He had official information, that there was no fixed idea of the relation between Great Britain and America. This relation should have been fixed. The supreme authority of the parliament had been openly *denied* by the

\* See Burke's Speech, p. 60, 61.

Americans: this should have been asserted, vindicated, and *recognized*.

The powers of the subordinate legislatures were vague, and indetermined: these should have been precisely marked out.

The mode of taxation was disputed: this should have been settled.

The want of knights and burgesses to represent the condition of the colonies in the British parliament, was the *only* ground on which the *equity* of a parliamentary taxation could be disputed: this should have been obviated.

Instead of obtaining any of these important points, what did he? "He repealed the stamp act: he made the declaratory act;" that is, he gave up the purse at the first word: and when the spoiler had carried it off, and was out of sight, and out of hearing, he vauntingly declared he had still a right to the purse if he chose to claim it. Of this sort is the

70 "fu-

"supreme magnanimity" so magnificently displayed.

But though this act of *spirit, fortitude,* and *magnanimity*, should be found to have done nothing toward securing the dignity, or authority of Britain, the act of concession we are required to believe restored tranquility to the colonies—"They were quiet." What are we to understand by their being "quiet?" Is it only, that having forced from us that which they demanded, they were quiet till another opportunity of resisting should present itself?—We allow the fact; make the most of it. Or are we to understand by it, that they were ready to submit to the principle of the declaratory act; to yield a ready obedience to the other laws enacted by Great Britain? so the orator seems to understand the phrase, and undertakes to prove, that they were "not only quiet, but shewed many unequivocal marks of acknowledgment and gratitude:" he gives us every advantage: he

selects "the obnoxious colony of Massachusetts Bay." He calls on us to hear "how these *rugged* people can express themselves on a measure of concession."

"If it is not in our power (say they in their address to governor Bernard) in so full a manner as will be expected, to shew our respectful gratitude to the mother-country, or to make a dutiful and affectionate return to the indulgence of the king and parliament, it shall be no fault of ours: for this we intend, and hope we shall be fully able to effect."

This is quoted as the genuine expression of their real sentiments, as originating from themselves\*.—What then will be the feelings of the reader, when he learns that these pretended expressions of the Bostonians were no expressions of their own: that they are only re-echoed back from the speech of the governor: that the assembly refused so much as to take into consideration the very measures to

\* Mr. Burke's Speech, p. 75.

which

which these words had been applied by him: that the whole tenor of the address is perhaps one of the fourest, most fullen, most surly, that ever was presented to a governor\*.—Yet some men scruple not to complain of “an *unscrupulous* opposition!”

Might a ministerial advocate indulge himself in like liberties, he might say with this orator, changing but a single word, “Thus are blown away the insect race of *factious* falsehoods! thus perish the miserable inventions of the wretched runners for a wretched cause, which they have fly blown into every weak and rotten part of the country, in vain hopes that when their maggots had taken wing, their importunate buzzing might sound something like the public voice†.

\* See the governor's speech, and the address in answer to it, in the Appendix to the Annual Register, vol. ix. p. 176, 179.

† Mr. Burke's Speech, p. 74.



The noble marquis resigned his place to a noble duke, who had been a companion of his battles, and a partner in his victories. The noble duke was assisted by the chief, who had led "the phalanx" in the lower house, and "inspired even the meanest of them with courage."—The people's lawyer, the great defender of British and American liberty, held the seals: and *he*, who was alone a host, not only deigned to put the ministry in array, but condescended to take his post among them. No doubt he did it on mature deliberation. *He* could not hastily give his confidence, "confidence he had before asserted in the house—was a plant of slow growth in an aged bosom." He was past the season of credulity.

Who could have imagined, that in his administration, any subject of contention could possibly have arisen between Great Britain, and her colonies.—Yet so it was. Very early in this administration, the demon of discord again stepped forth:

forth: nor has any magician yet been found to lay him.

Very early in the year 1767, the colony of New York presented a remarkable petition, in which they set forth, that notwithstanding the tender regard for their happiness, manifested in the last sessions of parliament, "yet the commercial regulations then enacted, instead of remedying, *had increased the heavy burdens*, under which the colony already laboured\*." These regulations were regulations made under the very administration of our panegyrist's hero. So impossible was it for that noble person, with all his penetration, and all his patriotism, to persuade this untoward people of his being able to discern their true interest, and willing to pursue them.

But if this colony could not bring itself to approve the wisdom of parliament in its commercial regulations, much less

\* See Commons Journals, vol. xxxi. p. 160.

could

could it bear any application of the principle of the declaratory act.

Two years before, an act had past among other purposes, for that of better quartering his majesty's troops in North America. The assembly of New York did not like the mode prescribed by that act: they therefore past an act of their own, directing another mode, inconsistent with the provisions made by parliament.

The parliament on this occasion determined to enforce the principle laid down in the declaratory act, and vindicate its power of making laws binding on the colonies. An act was accordingly past, suspending the assembly of New York, till the provisions of the former act should be complied with\*.

What ideas the Americans entertained of this exertion of power; what a conquest the magnanimous assertion of the declaratory act had gained over them; how

\* 7 Geo. III. c. 59.

fully

fully the authority of Britain was *pre-  
served* by it, was now apparent. "An  
"act of parliament, say the colonists\*,  
"commanding us to do *a certain thing*,  
"if it has any *validity*, is a tax upon us  
"for the expence that accrues in comply-  
"ing with it." Hence they argue —  
"The assembly of New York either had,  
"or had not, a *right to refuse* submission  
"to that act — If they had — and I ima-  
"gine, continues this writer, no Ame-  
"rican will say they *had not* — then  
"the parliament had *no right* to compel  
"them to execute it."

The ideas of liberty are different on the  
other side the Atlantic from those we en-  
tertain on the borders of the Thames.  
Had "the crown by its prerogative ref-  
"trained the governor from *calling the*  
"*assembly together*," all it seems would  
have been well †; but that parliament

\* See Farmer's Letters, p. 8, 9.

† See ib. p. 9, 10.

should

should interfere, and punish an act "of disobedience to the authority of the "British legislature," carries with it, "con-  
"sequences vastly more affecting §." And why so?—"Because it is a *parliamen-  
"tary assertion* of the supreme authority "of the British legislature, over these co-  
"lonies in the part of *taxation*:"—and is intended "to compel New York into a submission to that authority." One would think then that a restriction from the king, under the same circumstances, would have been a *royal assertion* of the supreme authority of the king over the colonies in the part of taxation; an assertion which to Englishmen would appear to have "con-  
"sequences vastly more affecting."—One thing is unquestionable; that to "restrain  
"the governor from *calling the assembly*," till the assembly should comply with the acts; to prevent their meeting till they should have met, and done what was wanted of them; however practicable it

§ See Farmer's Letters, p. 9, 10.

might appear in America, is what would appear totally impracticable in England.

The principle of the declaratory act was again called forth on another occasion. The parliament found that the colonies would not grant a permanent and adequate provision for the charges of the administration of justice, and the support of civil government: the house therefore gave it in charge to their committee to consider of proper methods of making such provision\*.

The very next day an order was made to bring in a bill for enabling his majesty to put the customs, and other duties, in the British dominions in America, and the execution of laws relating to trade there, under the management of commissioners to be appointed for that purpose, and to be resident there†. In conformity to

\* See Com. Journ. vol. xxxi. p. 392.

† See ib. p. 395.

these

might

these two resolutions two acts were passed \*.

The act for granting duties declares in the preamble, "that it is expedient a revenue should be raised for making a more certain and adequate provision for defraying the charge of the administration of justice, and the support of civil government." The commons then go on to *give* and *grant* certain duties on glass, red-lead, white-lead, colours, tea, and paper. By way of compensation, the same act gives a farther encouragement to the exportation of coffee and cocoa-nuts, of the growth of British America.

The monies arising from the duties imposed by this act are appropriated. So much is to be kept back, as shall be found necessary to the making of a certain and adequate provision for the administration of justice, and the support of the civil go-

\* 7 Geo. III. c. 41, and c. 46.

vernment, in the colonies. The residue is to be paid into the king's exchequer.

Of these duties, that on tea was accompanied by an exoneration, quadruple the amount. The sum imposed by it is three pence in the pound weight. But by another act of the same sessions, an inland duty of one shilling that had been paid before is taken off.

The act for appointing custom-house officers, declares, that the officers who had been appointed in virtue of an act of Charles the second, were obliged to apply to the commissioners in England for special instructions in particular cases; that hence, all who were concerned in the commerce of the colonies, were delayed and obstructed in their commercial transactions; as a relief therefore to merchants, and traders, his majesty is empowered to appoint commissioners of customs, with the same powers as are exercised by the



commissioners of the customs in England.

These acts, moderate and conciliatory as they appear, were received in America with the same abhorrence and indignation as the stamp act.—The resistance of the colonies against the stamp act was recalled to memory: was proposed as a pattern.—The *success* of that resistance is pointed out by the most popular of their leaders as an earnest of like success, to a perseverance in a similar conduct\*. At the same time they are cautiously forewarned against that tumultuous spirit which had accompanied the last resistance, and which, if suffered to run its own length, might have defeated its own purposes.

\* See Farmer's Letter iii. p. 29. Do they (meaning the advocates for acquiescence) says the author, "Do they condemn the conduct of these colonies, " concerning the stamp act? or have they forgot " its successful issue? ought the colonies at that " time, *instead of acting as they did*, to have trusted " for relief to the fortuitous events of futurity?"

The distinction between *internal* and *external* taxes, upon which the repeal of the stamp act had been contended for, was now abandoned. A new ground was taken. The power of parliament to lay *any* taxes *whatever* on the colonies, was flatly and totally denied. The authority, nay the very words of Mr. Pitt, though acting with the very ministry who passed this obnoxious act, were cited in support of this denial \*.

In consequence of the spirit rather than the letter of these instructions, the commissioners of the customs appointed under the act were insulted and beaten; their houses rifled; their lives threatened. The magistrates looked on as unconcerned spectators, refusing all assistance †. It now appeared, that the stamp act or the tea act were in themselves matters of indifference: that the question now was, whether

\* See Farmer's Letter iv.

† See Letters from Hutchinson and Oliver.

the Americans were at all subject to the supreme legislature of Great Britain \*.  
“ That lenient measures ~~are~~ <sup>are</sup> ~~not~~ <sup>not</sup> speeches  
“ would not do with this people † ”—  
That parliament must either give up all power of compelling the Americans to contribute towards the support of the public burthens of the empire: or else must fix a constitutional mode of compelling them to such contribution; and having once fixed it, must enforce it by firm and unrelenting measures.

Such was the situation of the colonies at the dissolution of the twelfth parliament of Great Britain.

\* See Bernard's Letters, p. 42.

† See ib. p. 62.

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## P A R T III.

EXAMINATION OF THE ACTS PAST BY  
THE THIRTEENTH PARLIAMENT OF  
GREAT BRITAIN RELATING TO THE  
COLONIES.

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### S E C T. I.

*Advantages of the periodical renewal of the  
legislative body. Use which this parlia-  
ment might have made of them in the  
American affairs.*

THE periodical renewal of the su-  
preme legislature of Great Britain,  
is on all hands allowed to be a circum-  
stance very favourable to the people. It  
puts into their hands the salutary power  
of excluding those from one branch of the  
legisla-

ture, who shall have been found unequal to the task, or unfaithful to the trust. By an attentive exercise of this power the people may root up such evils as happen to result, not so much from any vice in the government, as from the bad intentions, or mistaken views of individuals. They may correct, or fortify the principle of the government without endangering its essence.

But what is not commonly attended to, this circumstance is scarcely more favourable to the people, than it is to government itself. By a movement thus regular and tranquil, the operations of government are facilitated, and its dignity preserved. When the sovereign authority rests undivided in a permanent unchanging body, the difficulty of reformation is extreme. An erroneous system once begun must be persisted in; since to recede from it would carry that confession of fallibility which is so galling to the pride of power. That pride is an obstacle rarely to be surmounted

### Part III.

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ed. Not but that a reason might be given to justify in some measure, as well as to account for, its pertinacity. The respect and confidence of the people, are possessions which no government, however despotic, find it safe to squander, and cast away. The objects of respect being rather the persons of the men in power, than any principle diffused through the constitution, whatever tends to diminish that confidence and that respect cannot but have a dangerous effect.

Our happy constitution is free from this inconvenience. The ultimate dependence of the people is placed not in this or that body of men in office, but in itself. One parliament may depart from the principles of another parliament, and the respect to government continue the same. The political regeneration of the most active of the three bodies that compose the legislature, is a palliative at least, amongst other corruptions of arbitrary governments, for that of obstinacy. The new body in-

structed by, though uninvolved in the miscarriages of that which perished, appears, at its first entrance into the world in the purity of youth, with the experience of old age. The principles the acts of a preceding parliament are not the principles or acts of a succeeding one, any farther than it thinks proper to adopt them. To recede from the former, or to repeal the latter, is no mark of levity or inconsistency. It is only profiting by the errors of another.

These are some of the advantages which every new parliament might enjoy. And certainly the twelfth parliament of Great Britain had been guilty of *some* errors by which its successor might have profited.

That parliament had laid down some principles which could not be maintained: had past some acts which could not be justified. This we may assert without hesitation: for it had laid down principles, and past acts, contradictory to each other.

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It laid it down as a principle, that it was expedient to raise a revenue in America : it past an act in consequence of this principle, without having sufficiently, or indeed at all, prepared the way for its reception. It then abandoned the principle, and repealed the act, without doing any thing effectual for the support of its own dignity, or the recognition of its own authority. It then again recurred to its first principle, and past another act in conformity to it, without having taken a single step towards obviating the augmented difficulties that now stood in the way of its reception.—Hence a matter, not yet clearly understood, was involved in greater perplexity : and an enterprize which, at any time required great skill and address to succeed in, was rendered tenfold less easy of execution.

But on the other hand, from the collision of these different plans, lights had been struck out which might serve to



guide a new parliament through the labyrinth, which this very diversity of plans had rendered so intricate. The very works which each party had thrown up in its own defence, were so many vantage grounds, from whence a new parliament taking a comprehensive view of the country all around, might have directed its measures with a certainty of success.

The great objects before the parliament, were to fix the relation between Britain and her colonies : to examine into the right of the British parliament to impose taxes on the colonies : to enquire whether it was grounded on the constitution : if it was not, to give it up : if it was, to assert it ; and regulate and fix the mode in which it should be exerted : to consider whether the present were a reasonable time : to postpone accordingly, or give present effect to such regulations for that purpose as should be concluded on : and then to do, what after the settling

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tling of these most contested points would  
have followed as of course ; to fix on pro-  
per regulations for vindicating the unlimit-  
ed supremacy of the British parliament in  
all points whatever.

Whether this parliament attained all,  
or any of these important objects, will best  
appear from its own acts.

S E C T.

## S E C T. II.

*Proceedings of the second sessions of the thirteenth parliament.*

THE first sessions of this parliament was very short, and, except the passing the corn act, and continuing the expiring laws, was wholly taken up in the choice of a speaker, administering the oaths to members, and taking such other arrangements as are taken of course by a new parliament, for the unfolding of its powers.

It was the second meeting that was the first of business; and that of America, as might be expected, took the lead.

The sessions was opened by a speech from the throne, in which his majesty expresses "his concern that the spirit of  
"faction had broken out afresh in some of  
"his colonies in North America; and in  
"one of them had proceeded even to acts  
of

“ of violence, and resistance, to the execution of the law.”—The parliament is told, “ that the capital town of this colony had proceeded to measures subversive of the constitution; and attended with circumstances that manifested a disposition to throw off their dependence on Great Britain.”

The house in return answered his majesty, that they participated with him in the concern he felt at seeing “ that the arts of wicked and designing men had rekindled the flame of sedition in America; that they should ever be ready to *hear and redress any real grievance of his majesty's subjects in America*, but would never betray the trust reposed in them; would always consider it as one of their most important duties to maintain intire and inviolable, the supreme authority of Great Britain over every part of the British empire.”

So far all was well. To assert the supreme authority of Great Britain over the  
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colonies seemed due to their own dignity ; to promise a redress of real grievances, if any such should be found, was due to their own justice.

The first step towards ascertaining the bounds, if any bounds there be, to the authority of parliament over the colonies, was to enquire into the powers and exemptions which had been originally granted them. Before the house could proceed to the redress of grievances, it was necessary, that it should know, if any grievances did exist; and then from what source it was they proceeded.

It seemed, therefore, a very proper motion, that all letters patent and charters, that all commissions, orders, and instructions issued by the crown, that all official letters and affidavits, received from America since the first rise of the disturbances complained of, should be laid before the house. And one cannot see without a mixture of vexation and surprise, that such a motion, without any amendment or  
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explanation being offered, passed absolutely in the negative\*.

The documents thus moved for, stand distributed, we may observe, into three classes. The first contains such as were proper to be considered with a view to the question of the right: the second, such as were proper to be considered with a view to the policy, that had been hitherto observed in the enforcement of it: the third was to furnish such evidences of the temper of the people as seemed necessary, with a view to the policy that should be observed in future.

To withhold the first was very consistent in those who, satisfied with the determination of the preceding parliament, wished not to enter into any fresh discussions. The misfortune here is, that the determination of that preceding parliament had been made without any regard to those seemingly necessary materials.

\* See Com. Journ. vol. xxxii. p. 92, 93.

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With respect to those of the third class, these again are distinguishable into such informations, relations of matter of fact, or expressions of opinion, as had been communicated by the governors of the respective colonies, and such as had been communicated by private persons. With respect to the latter, it might be alledged, and it should seem with justice, that to make them public would be to sacrifice the informants to the fury of a people not very backward to take revenge, nor very delicate in the *mode* of taking it; that the consequence, in regard to the informant, would be the destruction of a number of persons, for what, with respect to this country at least, could not but be deemed a merit; and in regard to the public that no information would ever be given in future\*.

\* An obvious expedient is to leave the names in blank; but this would not hold good in those cases where the nature of the intelligence is sufficient to betray the person who has furnished it.

As to the governors, it could not, I think, be said, that the duty of their station would not excuse them, in some degree at least, even among the most violent malecontents; or that the respect habitually paid to that station would not protect them from the fate of inferior informants; and as to odium, they should not have accepted their trusts, under any other terms than that of being ready to bear so much of it as was incident to the discharge of their duty.

With respect to the second class of documents, I wish it may be possible to produce any justifiable reasons for withholding *that*. I am sure I know of none; and it seemed no auspicious omen of the character of the new parliament, that it should be disposed to acquiesce implicitly, and without examination in the measures of the ministry. Garbled and castrated documents, are no documents at all. The end of judicial examination is, if necessary, to censure; and what chance can there be of censure resulting from informations, which those who

would



would be the objects of it are at liberty to select, need not be observed.

Some papers, however, such as men in place thought proper to produce, were laid before the two Houses. And upon the information contained in them, several resolutions were formed. The purport of them was to reprobate as illegal, and unconstitutional, the resolves of the House of Representatives of Massachusetts Bay, calling in question the supreme authority of parliament: to censure, as tending to inflame the minds of the people, and to create unlawful combinations, the letters written by that assembly to the other assemblies on the continent, inviting them to join in petitions, which called the supreme authority of parliament in question: to record that riots and tumults of a dangerous nature, had lately happened in the province of Massachusetts Bay; to blame the council, and other civil magistrates for not properly exerting their authority for the suppression of these riots: to assert the consequent

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consequent necessity of employing the military in support of the *civil magistrate* \*, and the officers of the revenue : to reprobate the resolutions of the town-meetings at Boston, and their appointment of a convention, which last act is termed a *daring* insult on his majesty's authority, and an audacious usurpation of the powers of government †.

These resolutions were followed by an address to the king, in which the measures already taken by him to support the constitution, and to induce a due obedience to the authority of the legislature are approved : assurances of effectual support are given, and his majesty is requested to direct the

\* There is something rather singular in the manner of drawing up these resolutions. If the case was as stated in the preceding resolution, that the civil magistrates did not exert themselves ; it was not *support* they wanted, but *inclination*. If inclination, it was scarce expected, I presume, that the military should create it.

† See Com. Journ. vol. xxxii. p. 107, 108, 185, 186.

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governor of Massachusset's Bay to procure, and transmit, the fullest information touching all treasons, or misprisions of treasons, committed since the thirteenth of December 1767, in order that his majesty might issue a special commission for trying the said offences *within this realm*, pursuant to the statute of Henry VIII \*.

This proceeding has been the subject of much censure ; nor is it to be wondered at. The objections against it are plausible : thus at least I am bound to believe, who once was swayed by them. A more attentive consideration has obliged me to alter my opinion.

The statute, it has been said, was made before any colonies existed ; it could not therefore have the case of the colonies in contemplation. To resort to it therefore as a warrant for trying men for treasons, alledged to have been committed in the colonies, is a perversion of the law ; a per-

\* 35 Henry VIII. c. 2. Com. Journ. vol. xxxii. p. 108. Anno 1768.

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version the more wanton, because committed by those very persons, to whom, if a law for the purpose had been adviseable, it belonged to make one: "Durum est torquere leges, ad hoc ut torqueant homines\*." Whatever is to be done to the men, let the laws at least escape untortured.—Yet more:—Consider the preamble of the act, and nothing will appear so monstrous as this application of it. The treasons spoken of in the preamble, the treasons consequently which, and which *alone* it was the design of the act to put in a course of trial, are "treasons" committed "out of the king's dominions." To apply this to the case of treasons committed in Massachusset's Bay, what is it but to declare that Massachusset's Bay is not within the king's dominions? This is going farther in favour of American pretensions, than even the most sanguine American ever

\* Lord Bacon, De Augm. scient. lib. viii. c. 3. Aphor. xiii.

dreamt of going. The utmost that any American ever thought of maintaining, was, that America was out of the dominion of the British parliament. In all the paroxysms of party-rage, no one ever thought of maintaining that America is out of the dominions of the king. Here then have you gone to work, and cut the ground from under you; and in the waywardness of your cunning, and the blindness of your zeal, blundered out a parliamentary recognition of your own injustice and usurpation.—Nor is all the venom of this insidious proceeding apparent on the face of it. The main purpose of it, which it was resolved to *accomplish*, though it dared not to *avow*, was to give sanction to measures that were concerted by the ministry, for seizing obnoxious persons in the colonies, and transporting them over to England: a measure too odious to be trusted to open debate; too unpopular to be warranted by a law, to be *now* made for it on purpose; too atrocious even to have entered into the  
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breast of the arbitrary monarch upon whom it is now attempted to be fathered. Even that despot, under all the anxiety which dictated the extension of the penalties of treason to acts done out of his dominions, thought not of punishing them any otherwise, than in the persons of such as should *happen* to be found in this his kingdom ; for as to bringing over by force persons residing out of it, no such power is given : that power is now, it seems, by some forced and unnatural construction, for the first time to be assumed.

To these arguments, as being once my own, I hope I have done no injustice. The answer that might be, and was I suppose made to them, seems notwithstanding satisfactory.

The preamble, without doubt, may be, and sometimes is of use in directing us, when the words are ambiguous, to the meaning of a statute, as men ought to give attention to all circumstances that

promise to throw light upon the intentions of a legislator when they are obscure. But it neither *is* \* nor ought to be a rule of law, when the preamble speaks of a particular case, and the enacting part establishes a general provision, that the amplitude of the enacting part be limited by the narrowness of the preamble. It is in the *preamble* generally that we find an intimation of the *particular* mischief that called forth the exertion of the legislator's will: it is the *body* of the law (that is, the only part of the discourse to which with propriety belongs the name of law) that contains the provision made against mischiefs of the like kind in *general*. The views of legislators, it is to be confessed, have been apt in general to be too contracted; they have been too apt to content themselves with applying a particular and narrow remedy to the individual mischief that happened to have struck them.

\* See Bacon's Abridgement, Title Statute, and half a dozen authorities there cited.

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But if by good fortune they have done in one instance what they ought to do in all, and given to the expression of their will that generality which is capable of extending the remedy to other situations of things than that particular one, in which the individual mischief happened to spring up; it neither ought to be, nor has it been the rule, that the providence or felicity of preceding legislators should be frustrated by succeeding interpreters. Too much, indeed, would it be to say, and very hard upon the unlettered subject, were he never to know what obedience he should pay to a law, unless he knew the history of the times it passed in.

The statute in question seems to have been by no means inconsiderately penned: it points in the preamble to some individual case or cases, as having been the occasion of that general provision which it was prepared in the body to establish. It speaks of "doubts that had been moved concerning *certain kinds* of treasons, &c.

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“ and those committed not only out of  
“ the king’s realm of England, but out  
“ of other his grace’s dominions, that  
“ these could not be determined or en-  
“ quired of within his said realm of Eng-  
“ land.” Thus particular is the preamble:  
the enacting part is full and general, and  
meaning, as it should seem, to do more than  
make an *ex post facto* regulation, meaning  
to establish a permanent *provision*; it speaks  
of offences, not only such as were “ al-  
“ ready made and declared treasons,” and  
so forth, but such as should be *hereafter*  
made, and declared so, by any the laws  
of the realm (meaning the common law)  
or statutes; and here the words, “ *other*  
“ *his grace’s dominions,*” are dropped de-  
signedly, and considerately dropped (as I,  
seeing other marks of design and considera-  
tion, cannot but suppose), in order to  
give that *amplitude* to the provision in re-  
spect of *territory*, which by the word  
*hereafter*, it was unquestionably meant  
to give it in point of *time*: and it is then

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it goes on, and says, that all such "treasons, &c. shall be from henceforth enquired of and determined *before* the justices of the King's Bench, *by* a jury of the shire where the said bench shall sit, or else *before* such commissioners, and in such shire of the realm as shall be assigned by the king's commission, and *by* a jury of the same shire; and this, in like manner and form, and to all intents and purposes, as if such treasons, &c. had been committed within the same shire where they shall so be enquired of and determined."

It is true, that at that time there were no English colonies in America; but it is also true, that America then, as now, was *out* of this realm of England, and consequently by the letter of the act, treasons thereafter committed *there*, might be tried as if committed *here*.

It is also true, that though there were no dominions of the king at that time in America, yet there were dominions of the king,

king, which as the American dominions are now, were dominions of the king, although out of "this his realm of England." There were the islands of Jerfey, Guernfey, Sark, and Alderney, parcels of the duchy of Normandy; there was the town of Calais, parcel of *his* realm (as it is called) of France. If America has courts of its own now, in which treasons there committed may be tried, so had Calais, and the islands then; yet it is plain, that for treasons committed in Calais, or in the islands, a man might, by virtue of that act, have been tried in England, because the act provides for the trying in England of treasons committed wheresoever else a treason can be committed, since there is no exception. For the same reason, therefore, it cannot but be understood to have provided for the trial of treasons committed in America. Thus much as to the trial of the crimes in question; the taking order for which was the avowed and  
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specified object of this proceeding of the two houses.

As to the measure of *bringing over* the offenders; this, though not specifically recommended by the address, is alledged to have been in contemplation of those who framed it; and, it must be confessed, that nothing can be more natural than to suppose it was; but for what reason? because it is apparent, that without this measure, the other could not in the nature of things, I will not say have any effect, but could not be so much as put in practice. To think of suppressing an insurrection, or putting a stop to a course of treasonable resistance prevailing in America, or in the Norman isles, by the punishment of such of the persons concerned in it, as should from time to time come voluntarily and offer their heads to be cut off in England, is what no man in his senses could propose to himself; yet surely, from any thing the act has said, there is no good ground for presuming the

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penners of it to have been otherwise than in their senses. This one should have thought might have led the objectors to suspect, that the express mention of the power of arresting, and bringing over, was not so necessary to be made, either by those who framed the act, or by those who recommended it to be enforced. If the power of arresting for treason is virtually and implicitly given by the provision that gives a power of trying for treason; given in this instance, as in any other, virtually, implicitly, and of course; to give it by express words is at best unnecessary: it is perhaps nugatory; to say nothing of its being impolitic, which is a matter of distinct consideration. Now that this power was thus given is what seems to be the case.

A general and well known maxim of law is, that where a right or power is given, every thing is given that is necessary to the exercise of it. A more particular rule of law, applied to felony (and

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all treason is felony) is, that every statute making that sort of act felony, which was not so before, establishes, *ipso facto*, all these accessory provisions, which are incident to the main provisions against felony established by common law \*. Without saying any thing of accomplices, it subjects the accomplice to the punishment to which accomplices in original common law felonies are subject: it subjects both principals and accomplices to the penalties of forfeiture and attainder, without saying any thing about forfeiture or attainder: *a fortiori*, it must be understood to establish that mode of prose-

\* "As to the second point, viz. what is immediately implied in every statute making an offence felony, it seems clear (says Hawkins) that every such statute does by necessary consequence subject the offender to the like attainder, forfeiture, &c. and also does require the like construction as to those who shall be accounted accessories before or after, and to *all other intents* and *purposes*, as are incident to a felony at common law." Hawkins, b. i. ch. iv. sect. iv.

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cution, which is in use for felony, although it says nothing of any mode of prosecution, *a fortiori*, still must it be understood to establish these first steps, which are pursuable in every prosecution for felony, where it authorises by express appointment others that come after them. What instance, in short, is there of a clause in any statute to warrant the arresting of a person for a felony committed against that or any other statute? I verily believe none: certainly not many; yet was it ever thought that for such felonies men were not arrestable?

By the common law, therefore, persons committing treasons in America may be arrested *there*. By the statute law, viz. by the statute we are speaking of, they may be tried *here*. Was it necessary to say that being to be *tried here* they shall be *brought here*? I think hardly. There would be no end of legislative babbling, if men must be eternally specifying what is necessarily implied. If this power then  
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of bringing offenders over, is a power that followed necessarily and of course, from that of putting them on their trial; if it was not necessary to be mentioned even in a law at large, to what purpose it should have been specified in a short and general address, is more than I can see. And if, however necessary, it was formidable and unpopular, I see not why that should have been a reason for bringing it into view.

“ But the application of the statute; of this power, and every thing else belonging to it, if not illegal, it has been said, would be harsh and cruel: as a measure, therefore that would not, and perhaps ought not to be borne, the recommendation of it was impolitic. Are there not courts of criminal jurisdiction in America?—Prosecute in them.”—“Prosecute in America for the treasons of America!” This a man may bring himself to put on paper; because the paper shews no blushes. But that any man should be able to say this in a firm tone,

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and with a steady countenance, is more than I can conceive.

The Golden Legend, or some other history equal authentic, speaks of a time when this might have been done. It was a time brought into remembrance by an ingenious pleader \*, at an æra when these authorities were in high repute for the purpose of proving what a man in those days would not have thought of proving from any other than such authorities; that a man may without inconvenience be judge in his own cause. A certain pope, infallible as all popes are, was by some strange accident found to have done something that he ought not to have done. This put men in a great perplexity. For who should judge the judge of judges, God's lord lieutenant upon earth? the cardinals being the next persons in the world, he wanted the cardinals to judge him.—No—

\* See a passage of the Year Books, cited in III. Blackst. Comm. c. 20, p. 299.

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they begged to be excused. What is to be done then? said the pope. To be done? replied the cardinals. Why you must e'en judge yourself. Agreed, said the pope. I sentence myself to be burnt; and burnt he was accordingly. For so generous a piece of complaisance, the least thing they could do was to make a faint of him; and a faint he was. But the Boston saints are not of this stamp.

Thus much as to what was done in this session towards maintaining the authority of Great Britain. But parliament had professed, that it would be ready to redress the grievances of America.

To be ready at all times to hear complaints of grievances, is no more than one expects from a House of Commons. They had been at the pains, we see, of expressly professing such a readiness on this particular occasion. After these professions, when complaints were preferred, if couched in decent terms, it was natural to expect that a decent attention should be paid them.

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Yet a petition from the major part of the council of Massachusetts Bay was near being rejected, because it was not passed in a legal assembly of the council; though the dissolution of the general court rendered it impossible to address the house in their legislative capacity.—It was at last received as a petition from the individuals who signed it. But though couched in very moderate terms, and glancing only obliquely at the want of constitutional right in the parliament to lay internal taxes on the colonies, it was ordered to lie upon the table\*.

A petition from the agent of Massachusetts Bay, and a representation from the general assembly of New York, were offered to the house. But as these addresses directly denied the right of taxing, they were with better reason rejected.

Towards the close of the sessions, a motion was made, that the house should re-

\* See Com. Journ. vol. xxxii. p. 136, 137.

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solve itself into a committee, in order to take the last American act into consideration. The design was, as it seemed, to pave the way to a repeal of the act. But the motion was over-ruled\*; and in a manner rather slighting, by calling for the order of the day.

In the speech which closed the sessions, his majesty thus addresses himself to his parliament.—“The measures which I had taken regarding the late unhappy disturbances in North America, have been already laid before you. They have received your approbation, and you have assured me of your firm support in the prosecution of them †.”

What approbation was due to the measures taken by his majesty, I pretend not to determine. But surely the measures taken by *parliament* during this session afford not much scope for panegyric.

\* See Com. Journ. vol. xxxii. p. 421.

† See ib. p. 453.

Promises had been made of hearing and redressing grievances : when the time came they would scarcely hear complaints of grievances. Promises had been made of maintaining the supreme authority of Great Britain : the way these promises were fulfilled, was by investing his majesty with a power, which, according to them, he was invested with before. What else did they do ? just nothing. Things were left in the same state of uncertainty and confusion at the end as at the beginning of the sessions.

If parliament was backward in speaking out, the same could not be objected to the ministry. It was no longer than five days after the prorogation of parliament, that a circular letter was written by lord Hillsborough, then secretary of state for the colonies. In this letter, after reciting the substance of the king's speech, the secretary says :

" I can take upon me to assure you,  
" notwithstanding insinuations to the con-  
" trary,

“trary, from men with factious and se-  
 “ditious views, that his majesty’s pre-  
 “sent administration have at no time  
 “entertained a design to propose to par-  
 “liament, to lay any *further* taxes upon  
 “America for the purpose of raising a  
 “revenue ; and that it is at present their  
 “intention to propose, in the next sessions,  
 “to parliament to take off the duties upon  
 “glass, paper, and colours ; upon con-  
 “sideration of such duties having been  
 “laid contrary to the true principles of  
 “commerce\*.”

I cannot assent to many of the severe  
 strictures which have been made upon this  
 letter.—It is unfair to call it, as it has  
 been called † “the promise of a peer, re-  
 “lative to the repeal of taxes.”—The letter  
 was written officially ; by a secretary who  
 indeed happened to be a peer. But whose  
 was the promise ? the promise not of the  
*peer*, but of the *secretary*. Nor is it a

\* See Burke’s Speech, p. 24, 25.

† Ib. p. 26.

promise to *repeal* a tax; but a promise only that the repeal shall be *proposed* to the house. Nor does it imply, as it has been said to imply \*, "that the idea of "taxing America for the purpose of raising a revenue, is an abominable project."—Nor does it *reject* the principle, or deny the right, of taxing for a revenue. It declares only, that it is not the intention of the present ministry to propose the making of any further use of that right: to exert it by the imposition of any new tax; it promises only, that the ministry will endeavour to obtain a repeal of part of the duties imposed on that principle; not because the principle was false, but because the right had in this instance been so exerted as to violate another set of principles; the principles of commerce.—These mis-statings however are not uncommon with "unscrupulous oppositions."

\* Mr. Burke's Speech, p. 27.

But

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But in vindicating the letter from *unjust* censures and *unfair* constructions, it is impossible not to confess that the writing of such a letter, at such a time, seemed on many accounts reprehensible. A strange flight seemed to be put upon parliament. Sentiments appear to be attributed to it, not only which it had *not* manifested, but directly opposite to those which it had manifested. If it was the opinion of parliament to repeal the duties, how came a motion made for that very purpose to be rejected?

By this letter, subjects were taught to await their destiny, not from the resolves of parliament, but from the good pleasure of the crown. With parliament every thing was to originate, which carried the face of severity; with the ministry, every thing of grace and favour.

That the resolutions made by parliament, and the plan announced in the letter of the secretary, were at least discordant, will, I think hardly be denied.



What conclusions would the colonists draw from thence? either, they would say, parliament in the next sessions will controul the minister; and then no faith is to be given to the promises held out in this letter: or the minister will manage parliament, and then we may laugh at its thunders; in vain it points them: the minister will not suffer them to be hurled. Whether of the two conclusions was drawn, the effects of the letter could not but be hurtful. On the one hand the ministry, on the other the parliament, was brought into disgrace.

S E C T.

S E C T. III.

*Proceedings of the third sessions.*

THE effects of the letter mentioned at the end of the last section, appear to have been precisely such as might have been expected. It seems to have been attributed, as well it might, to the fears of government. The authority of parliament was still more despised: the pretensions of the colonies rose still higher. Nothing less would now serve them, to judge from the discourse of one of their leaders in Boston, than the total repeal of all the revenue acts from the fifteenth of Charles II. This leader must, in comparison of the rest, have been a man of singular moderation, not to say a false brother: since if we may believe an officer of rank of that province, writing from New York\*, it

\* See Hutchinson and Oliver's Letters, p. 38, 39.

was

was by this time universally understood in the last mentioned place, that not these acts alone, but *all* acts of parliament whatsoever, made concerning the colonies, were *ipso facto* void; all exercise of parliamentary authority over them, an usurpation *ab initio*. "That they were bound by none made since their emigration, but such as they chose to submit to for their own convenience:" that is by none at all.

In this situation were the affairs of America when the third session of this parliament was opened by a speech from the throne, which must now be mentioned.

In this speech his majesty \* begins with recommending to the serious attention of his parliament the state of his government in America. He declares that he had endeavoured on his part, by every means, to bring back his subjects there to their duty,

\* Jan. 9, 1770.

and

and to a due sense of lawful authority ; but he adds with concern, that his endeavours had not answered his expectations ; that in some of his colonies many persons had embarked in measures highly *unwarrantable*, and calculated to destroy the *commercial* connection between them and the mother-country.

This speech, compared with that which had opened the preceding session, cannot but appear extraordinary. In that we had been told of “ a state of disobedience to all law and government ” prevailing in one of the colonies ; of “ a spirit of faction ” being prevalent in more ; of circumstances that “ manifested a disposition to throw off their dependence ; ” and “ of a steady perseverance that had been resolved on in consequence, for the purpose of supporting the constitution, and inducing a due obedience to the authority of the legislature.” This was the language *then* ; —and *now*, without any thing having happened to indicate, that that state had changed

changed, unless it were for the worse; or that that spirit had been, as was vainly hoped, "extinguished," without any measure having been taken to give that support, or to induce that obedience. Now that the colonies had voted the proceedings of the last sessions of parliament, with respect to them, to be illegal and unconstitutional; we hear of unwarrantable measures to destroy—what?—not the dependence on the mother-country, but a certain "commercial connection."

When the answer to this speech came to be debated, a proposition was made, in the way of amendment, to intimate an intention of "enquiring into the *causes* of the "unhappy discontents which prevail (says "the amendment) in every part of his majesty's dominions."

Of a proposition thus generally worded, the design seemed to be full as much to promote the discontents themselves, as an enquiry into the causes of them. If instead of "every part of his majesty's dominions,"

“minions,” the words had been “his majesty’s American dominions,” the proposition might have been more difficult to combat. Howsoever it was in any other part of his majesty’s dominions, in America, and on account of America, discontents most certainly did prevail; discontents the most violent in their degree, and the most universal in their extent; discontents in comparison of which any others that might happen to prevail in the metropolis, or a few counties, scarcely deserved the name. Discontents, into the causes of which, no enquiry, even in this late period, had as yet been made: an enquiry which has never been yet made, speaking even of the present moment; but which must be made, and that thoroughly, in order to give any chance for quieting them.

A provident and determined minister, one should have thought, might himself have proposed the enquiry under such a limitation; so, however, it happened, that as the opposition was content to propose it  
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in the lump, so was the ministry to throw it out. The amendment was not amended, but over-ruled. And on this occasion one can hardly help acknowledging of the ministry, in the words of their severe accuser, that they had not hitherto given "any proof of large, and liberal ideas" in the management "of this great concern; that they had never looked at the whole of our complicated interests in one connected view; never seemed in short to have any kind of system right or wrong\*." I wish this had been as ill founded as many of his other charges. †

But though the house would not engage to enquire into the causes of the discontents in America, they acknowledged, that the state of his majesty's government there did "undoubtedly well deserve the

\* Mr. Burke's Speech, p. 17.

† In allowing the truth of this charge, it is but fair to remind the reader of its being equally true of the ministry *with whom* this gentleman acted, as of those *against whom* he declaims.

"most serious attention of parliament." They represented the effects of those discontents in a more serious light than they had been represented from the throne: the measures of the malcontents, they said, "by attempting to subject the highest legal authority to the controul of individuals, tended to *subvert* the foundation of all government." A matter of infinitely more import and danger than the bare breaking a "commercial connection." Against measures thus unwarrantable they promised, that "no endeavours should be wanting on their part to make effectual provision." What steps were taken to fulfil these promises?

As soon as this business came to be taken up in the House, two petitions were presented; one from the agent of the council of Massachusetts Bay, drawn up in a quaint, pert style, equally unbecoming the subject it treated, and the assembly to whom it was addressed. Of this no notice was taken—which was as much as it appears

"most



appears to have deserved: the rather as it did not even state that it was presented by order of his constituents\*.

Another petition was presented from the British merchants trading to America, complaining of the great interruption of their trade, and attributing that interruption to the act passed in the seventh of his majesty's reign.

This petition was read; and in compliance with it, a bill was ordered to be brought in for the repeal of so much of the act as laid duties upon glass, red lead,

\* This curious petition may be seen at length, Com. Jour. vol. xxxii. p. 726. The following lines may serve as a specimen: "The errors and "improvidence of ministers (he has all along been talking of the ministers of the present reign, and it seems it was their errors and improvidence that) "with the hostile designs and proceedings of "France." Did what? "Brought on the late "expensive and dangerous war: and British America is now, in consequence of the errors and "improvidence of his majesty's ministers, brought "into"—what?—guess reader—"a state of invitation of foreign war."

white

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white lead, painters colours, paper, paste-boards, mill-boards, and scale-boards. The taking off the duty upon tea was by this means all that was wanting to a full and effectual compliance with the petition. A motion for that purpose was accordingly made, but it passed in the negative.

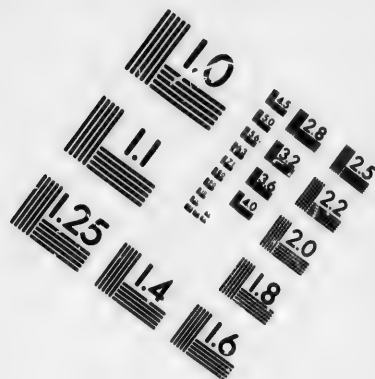
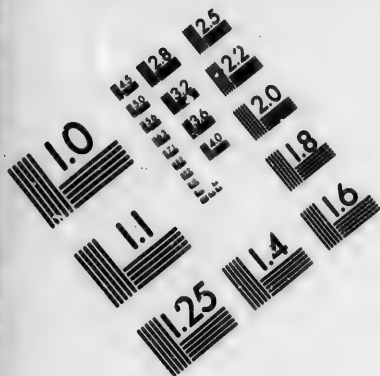
This partial repeal of the act complained of, could not be considered as an *obligation* conferred on the Americans. Nay a total repeal of it at this moment would not perhaps have been considered in that light. Lord Hillsborough's letter was still before them. The motive for the repeal would have been fought in the fears of the ministry, not in the justice of parliament. They did not vouchsafe so much as to ask for the repeal; no petition was presented in their *name*; at least none by their express authority. The partial repeal was granted as a favour to British merchants. A total repeal would have been a greater favour, but still the favour would have been to *them*, and not to the colonists.

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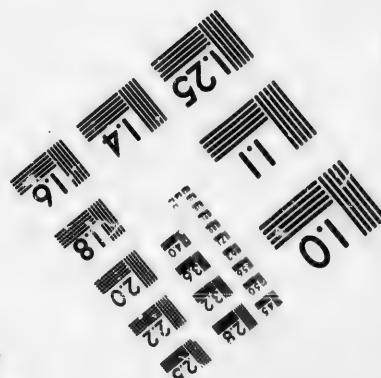
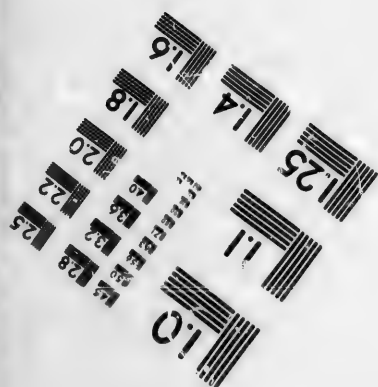
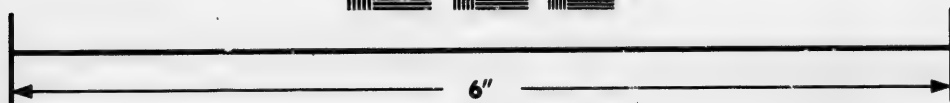
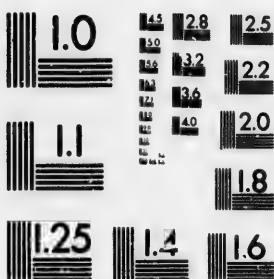
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Had this measure, however originated in parliament itself, had not the merit of it been forestalled by its being announced beforehand in a ministerial letter, it might perhaps have done something, though but little, towards conciliating the minds of the colonists. But thus announced it seemed rather to proceed from complaisance to the minister, than from a desire of giving satisfaction to the colonies. For precisely so much of the obnoxious act was repealed as the secretary had promised should be repealed, and no more.

Mean time the idea that the parliament was only subservient to the minister; that it was not even a legal parliament, was openly maintained by the malecontents at home. In a remonstrance to the throne it was declared, that "representatives of the people  
" were essential to the making of laws:  
" that there is a time when it is morally  
" demonstrable that men cease to be re-  
" presentatives: *that* time (add the remon-  
" strants) is now arrived; the present  
" house

"house of commons does not represent  
"the people\*."

The same idea was carefully communicated to the colonies by a self-created society, which called itself "the Society of  
"the Bill of Rights." Sums were collected for the support of the council and assemblies, who resisted the execution of the acts of parliament: with these sums were transmitted letters from a committee of this society, signed by members of the British parliament †, exhorting these assemblies to persevere in their resistance to the laws of that very parliament; which they declared to be no parliament, though the writers sate and voted in it.

"Property (say these able senators and  
"acute lawyers) is the *natural* right of  
"mankind. The connection between

\* See Commons Journals, vol. xxxii. p. 804.

† See Annual Register, vol. xiii. p. 224, 225.  
The names are John Glynn, Richard Oliver, John Trevanian, Robert Bernard, Joseph Mawbey, James Townsend, and John Sawbridge.

"taxation and representation is its necessary consequence. This connection is now broken, and taxes are attempted to be levied both in England and America, by men who are not their respective representatives. Our cause is one. Our enemies are the same. We trust our constancy and conduct will not differ. Demands which are made without authority should be heard without obedience."

Thus encouraged to resist and despise parliament, was it likely that the colonists should be contented with a partial repeal of the obnoxious act? A repeal which retained the principle, and left a duty to be levied which had been imposed on that principle.

During the course of the sessions a second attempt was made to obtain an absolute repeal of the obnoxious act. But that too failed \*. And toward the close of the

\* See Comm. Journ. vol. xxxii. p. 876.



same sessions another attempt was made to induce the parliament to conform to the directions of the king, and to fulfill its own engagements, by entering into a full and serious consideration of the state of the government in America.

The commissions of the governor of Massachusetts's bay, and of the commanders in chief of the forces in North America, some messages from the assembly to the governor, and the governor's answers were laid before the house. As soon as they had been read it was moved to present an address to his majesty, to thank him for the communication of these papers, and for having thus referred to his parliament the state of his government in America; to assure him that the house had entered into a serious consideration of the matter thus referred to them; to represent to him, that misunderstandings and disputes had arisen in almost every part of his dominions in America, between the civil government and military commanders

ers, since the appointment of a commander in chief; that the representatives of the people in general court had complained, that according to the arrangement of commands in America, there was a military power without any check by the power of the civil government, and uncontrollable by the supreme executive power of the province; to state their opinion, that this unhappy state of doubts and disputes had long called for a clear and explicit definition of the powers and authorities granted to the governors and commanders in chief of the provinces and colonies, and to the commanders in chief of the military forces in North America:—and did require some express directions and instructions as to the exercise of the said powers.—And therefore to beseech his Majesty to give directions that the powers and authorities granted in the respective commissions, orders, and instructions might be amended in such cases where they clash with each other, or contained powers

powers not warranted by law and the constitution \*.

Never surely was a less exceptionable motion made in parliament. Had those who took the lead been really inclined to do what they had solemnly engaged to do; had they meant to take the state of America into serious consideration, what one should have expected is, that instead of stifling the motion, they would have promoted a full enquiry. If the momentary establishment of a commander in chief, independent of the civil magistrate, was at all to be justified, it must be because, under the present constitution of the provincial government, the power of the civil magistrate had been found too weak for the support of the civil government. If this was not the case the establishment of such a commander should be revoked: if it was the case, it was the duty of those who advised this establishment to point out this

\* See Com. Journ. vol. xxxii. p. 967.

constitutional weakness, to call on parliament to apply a constitutional remedy. Here then was offered as good an opportunity as could be offered, to have the whole system of American government fairly canvassed, and to prepare the way for a general constitutional reform.

Parliament could have grounded that reform on a popular idea; in strengthening the hands of the civil magistrate, they would not so much have seemed to have been laying new restraints on the colonies, as shielding them from the danger of seeing the military erected into executors of the law.

But so it was, parliament chose rather to sit still and see every act of its power abhorred, every act of its lenity treated with contempt; it chose rather to neglect the recommendation from the throne, and to forfeit its own engagements, than boldly enter on a subject, which, sooner or later, must be entered on more fully: the hue of resolution, which it had borrowed at  
the

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the beginning, was now sickened over, and the sessions closed without having done any thing effectual, either to relieve the complaints or check the tumults of the colonies. All that it did was to adopt a wretched pallative.

“ That did but skin and film the ulcerous part,  
“ While foul corruption running all beneath,  
“ Unseen, infected” —

SECT.

## S E C T. IV.

*Proceedings of the seventh sessions.*

HOW little attention, during the second and third sessions, was paid to the affairs of America, strong as were the terms in which they had been recommended from the throne, we have already seen. The three succeeding sessions passed away, as if they had been equally forgotten both by the crown and by the two houses.

Early however in the concluding sessions an incident happened which roused the ruling powers from their lethargy. A message accordingly was sent from his majesty to the two houses, together with certain papers. The message contained two requisitions; the one of a more particular purport, that he might be enabled to put an end to the disturbances then subsisting; the other in general

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terms, that he might be enabled to secure the dependence of the colonies. The papers contained a history of the disturbances.

The duty, payable in America, that had been imposed on the article of tea by the last parliament, this duty, we may remember, continued unrepealed. An alteration indeed had been made respecting that article in the sessions preceding this, tho' of a nature very different from taxation. The duties paid here in England under the name of custom, upon its original importation, was by a drawback remitted upon all teas exported to America; whether exported by the company directly, or by such private adventurers as should have purchased it at their sales\*. Nothing was added on this account to the duties payable in America. By this operation the charge upon the only article that continued the object of a tax payable

\* 13 Geo. III. c. 44.

in America, was reduced to a pitch below that at which it subsisted here in England.

The degree of present ease thus given to the Americans, it was hoped, would completely calm their anxieties for the future. The policy however was not so refined, as to pass upon a people, in whose minds suspicion had been rivetted by a ten years struggle. This operation would have made it plain to them beyond a doubt, though it had not been so before, that the profits of that specific tax were not the reason of imposing it, and that the only purpose of its being kept alive was to let in an indefinite train of others that were to follow. Indeed it was now rendered impossible for the most credulous to believe what had been so solemnly averred, that "his majesty's ministers," allowing that they *once* might have been, were then without any design to lay any farther taxes upon "America for the purpose of

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"raising a revenue\*." The most natural conclusion to men in their temper of mind was, that his majesty's ministers were *never* to be depended upon; the most charitable conclusion, that they were not *now*. Any definite system of taxes, to such an amount as could appear to contain in itself a sufficient reason for establishing it, and could serve to mark out the limits of the present exigencies; any definite system of taxes, however heavy, would have affected them less sensibly, than that indefinite and endless train which their imagination painted to them as about to be grounded on this insidious manoeuvre.

The effects of this persuasion soon manifested themselves in action. The East India Company, who had not that strong interest which the Americans had to quicken their apprehensions with respect

\* See Lord Hillsborough's Letter, as quoted in Mr. Burke's Speech, p. 25.

to the consequences of this manoeuvre, had been allured by the prospect of a copious sale, and against the opinion of a great many of its members, shipped for the colonies large quantities of the obnoxious drug.

The first cargo that came to Boston found the inhabitants determined at all events not to suffer it to be landed. The resolution was communicated to the consignees. A committee of inhabitants associated to see to the observance of it: and the necessity of returning without landing any part of the cargo was signified to the persons who had the charge of it, in the strongest terms. The alacrity of those to whom this singular mandate was addressed, not corresponding with the impatience of those who issued it, the negotiation was terminated by a company of persons in disguise; who after making themselves masters of the vessels on board of which the commodity had been stowed, emptied the lading into the sea.

Of

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Of this nature were the disturbances, of which the papers communicated by his majesty contained the history.

In consequence of these advices, and the message that accompanied them, four several acts were past.

One to discontinue, for a certain time, the landing or lading any goods at the town, or within the harbour of Boston\*.

A second, for the impartial administration of justice, in the cases of persons questioned for any acts done by them in the execution of the law, or for the suppression of riots and tumults in the province of Massachusetts Bay†.

A third for the better providing suitable quarters for the officers and soldiers in North America‡.

And

\* 14 Geo. III. c. 19.

† 14 Geo. III. c. 39.

‡ 14 Geo. III. c. 54.—As this act only provides that the troops shall be quartered there, where their presence may be required; as the Americans, in honouring it with a place among their list of grievances,

And a fourth for the better regulating of the government of the province of Massachusset's Bay in New England\*.

To these we may add a fifth act, for regulating the government of the new acquired province of Quebec†. Not that the last act had any avowed connection with his majesty's message, or with the disturbances on which that message was founded; or with any of the griefs, real, or pretended, of which the old colonies had complained. I add it here, because it makes a part of the colonial system of government: and because the General Congress, as it calls itself, has thought proper to rank it *now* in the number of their grievances.

grievances, have not stated any specific objection to it, it will be sufficient just to have named it. In fact the troops might as well be recalled, as stationed in barracks, where they cannot be ready to do the duty for which they are sent.

\* 14 Geo. III. c. 45.

† 14 Geo. III. c. 83.

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Of these five acts, the first three are only temporary remedies applied to temporary evils. The two last seem intended as parts of a general and permanent plan.

**Bb SECT.**

Of

## S E C T. V.

*Act for shutting up the port of Boston.*

**T**HE preamble of this act sets forth that commotions and insurrections, subversive of his majesty's government, and destructive of the public peace, had been raised and fomented in Boston: that during the course of these insurrections, some valuable cargoes of tea belonging to the East India company had been destroyed: that while things continue in this situation, commerce cannot be safely carried on; nor the customs, payable to his majesty, be collected; and that it is therefore become expedient that the officers of his majesty's customs should be removed from thence.

It is then enacted, that from the twenty-first of June then next ensuing, no goods whatever shall be exported from, or im-

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ported to, the port or harbour of Boston, under penalties therein specified.

*Boston.*

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In order the more surely to provide for the efficacy of this prohibition, a kind of introductory offence, is, by another clause superadded to the main offences created by the foregoing. Vessels are forbidden to lie at anchor, or to hover within a league of the said port or harbour; and to enforce this prohibition, power is given to any officer of the navy, or of the customs, to seize and confiscate any vessel not departing after a proper warning, therein specified "to such station as the said officers shall appoint," or to some other port.

From this general prohibition are excepted stores for his majesty's use; fuel and victuals brought coast-wise from any part of the continent of America, for the necessary use and sustenance of the inhabitants; and also all ships which were actually within the said harbour, on the said first day of June, either laden, or with in-

tention to lade or land any goods, and which should depart within fourteen days.

Power is given to his majesty in his privy council, whenever it shall there be made to appear to him, that peace and obedience to the laws are *so far* restored, as that trade may be safely carried on, and the customs duly collected, to fix the extent and bounds of the harbour, and such quays and wharfs therein for landing or lading goods; and to appoint such a number of officers of the customs as he sees fit; which quays and wharfs, and no other, shall be open for the landing or lading of goods.

This power however is not to be exercised till his majesty shall be duly informed in council, that full satisfaction has been made to the East India company for the tea destroyed; as well as to the custom-house officers, and others, for the damage they may have sustained by the insurrections in the preceding months of December and January.

This



This is a temporary act of coercion : and I cannot see that any reasonable objection lies against it. Two objections were however made to it.—That it condemned the town unheard ; and that it involved the innocent with the guilty.

As to the first of these objections, what occasion was there to *hear* the town of Boston ? were not the facts sufficiently notorious ? that from the beginning of November to the seventeenth of December, associations had been formed at Boston, denying the power or efficacy of acts of parliament : that at public meetings, consisting of many of the principal inhabitants of Boston, nightly watches had been appointed to prevent the landing of the tea : that from these meetings, orders had been sent to the consignees not to receive it ; to the masters of the ships not to unlade it, but to return back to England with it : that at last, when the tea had lain so long in the harbour without clearance, that it would the next day have

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been liable to be seized, and so landed by the officers of the customs, it was publicly and openly destroyed; destroyed by persons in disguise indeed, but acting to all appearance under the guidance of these public meetings:—All these were circumstances that appeared from accounts published by order of their meetings; in papers under their own direction.

These accounts indeed speak of those who destroyed the tea, as of persons who by a disguise they had assumed had rendered themselves undistinguishable: but this was a veil too thin to conceal, nay we may venture to say, was never meant to conceal the real authors. The outrage committed, if so they will have it, by unknown individuals, was adopted by the public: and the destruction of the odious weed was openly justified, as the only means which now remained to prevent its landing.

In truth, if the act imposing the duty on this commodity, was in their opinion such an infringement on their liberties as justified

justified resistance, they could not well have done less than what they did. But the question before us is not concerning the propriety of what was done, but concerning the ground there was for being persuaded that it was done; whether the violences alledged were sufficiently authenticated for parliament to proceed either to acts of indemnification, if it was thought proper to give up its authority; or to acts of vindication, if it was thought proper to maintain it.

Let us put the case of a foreign prince: suppose the king of Spain. He thinks fit to interpret an article of treaty, as if it excluded British ships from trading to any given port, or in any given commodity: to which port, and in which commodity, the treaty, according to our interpretation, gave us a full right of trading:—a secretary of state receives intelligence that the Spaniards had acted precisely in the same manner, as the Bostonians have done: this account comes to him from the

owners of the ships, from the consignees at the factory, and is moreover confirmed to him by the papers regularly published under the authority and inspection of the Spaniards. Will any man say this is not sufficient evidence, sufficient notoriety, to proceed upon? Upon one half of that evidence, Mr. Pitt's advice would have been to fit out a fleet, and demand satisfaction at the cannon's mouth,

What farther evidence therefore could reasonably be required, is more than I can perceive; and unless parliament meant to give up its rights entirely, I see not how it could have proceeded in a milder strain.

The officers of the customs had been forcibly debarred from the exercise of their duty. What could the act do less than recal those officers from a station, in which the violence of the people had rendered their presence useless? Having done thus much, how could it do otherwise than put a total stop to the commerce of the place, unless by giving to it a total exemption

tion from the burthen of those imposts, of which the officers had the charge, it rewarded where it meant to punish? His majesty's British subjects (to say nothing of the destruction of the subject matter of their trade) had been debarred, by the Americans, the common liberty of trading. What could be more consonant to all the ordinary notions of justice current among mankind, than to punish the authors of this oppression, by giving the oppressors themselves a taste of it?

Care is taken, in the mean time, to prevent the punishment from running into excess, and beyond what seemed necessary, for the purpose of prevention, as to the *measure*, the object, or the *continuance* of it. The means are also given of selecting from amongst the croud of delinquents those whom a pre-eminence in delinquency might render fit objects for a pre-eminence in punishment, whose stronger bias required a stronger balance to correct it.

Care

Care, for example, is taken to leave the port open for provisions; to prevent ships already there from suffering by a regulation they could not be apprised of. The duration of the act depends on the Bostonians themselves; and the power left in the hands of the crown of appointing the wharfs and quays, where exclusively goods are thereafter to be laden or unladen, is only a power of directing the greatest weight of punishment against the greatest body of delinquency. This power indeed may be abused; and so may any power, in the exercise of which the king, or any other magistrate, may use his discretion. In whatever hands it had been lodged, it was liable to abuse; yet the same power has been given to the crown here in England, by different acts of the legislature, where the same reasons did not subsist\*.

\* See 1 Eliz. c. 11. 13 & 14 Car. II. c. 11. Blackstone's Commentaries, Book I. c. 7.

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II. c. 11.

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But againſt this act there is yet another objection: in one common puniſhment it involves both guilty and innocent; and it is therefore, we are told, unjuſt.

He who urges this topic of accuſation, —and none has been urged more univerſally, or with greater vehemence—does not rightly conſider the end of puniſhment.

It may ſeem ſtrange at firſt ſight, yet it is moſt certainly true, that this plea, levelled as it is againſt *ſeverity*, and urged on behalf of *lenity*, is built on the ſavage principle of *vengeance*.

If vengeance be the end of puniſhment, that puniſhment which acts upon him who did *not* do the obnoxious act, as well as upon thoſe who *did* it, is certainly improper. If it is with A I am angry; the ſufferings of A may give me ſatisfaction, but the ſuffering of B, with whom I am *not* angry, will give me none. Were I to beat A, who had angered me, my behaviour might perhaps, according to the circumſtances of the quarrel, be approved; were

were I to beat B, or any other person who had not angered me, I should certainly be condemned: every mouth would exclaim, and with reason, that my behaviour was unjust.

Individuals obeying the impulse of passion, acting on the selfish principle, punish because they are angry, and within certain bounds, upon certain occasions; the suffrage of mankind in general allows them to do so.

But surely governments, magistrates, as such, *do not* punish, because they are angry,—at least they *ought* not. Thus much at least will, I suppose, be acknowledged on all hands, that were it certain, that in any instance, the legislature punished a man, or set of men, because the members who composed the legislature were angry with them, and for no other reason, every man would certainly cry shame on such a legislature.

The *end*, the *only* defensible end, of punishment inflicted by public hands, is the  
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suppression of mischief; of that particular mischief, the sense of which was the cause of punishment being thought of. Now whether this end, the suppression of mischief, be obtained by the punishment of A, who was the author of it, or of B, who was not the author of it, does not make so material a difference, as at first sight, we are apt to think: provided always, that the sum of evil introduced by the punishment, be in neither case greater than what is necessary for the suppression of the mischief.

True it is, that the suffering of B, who is not guilty, is a thing by no means to be wished; but neither is the suffering of A, who *is* guilty, a thing at all to be wished, unless upon the principle of vengeance, which we have reprobated above. That the mischief could be suppressed without the suffering either of the innocent, or the guilty, were a thing devoutly to be wished.

It

It is also true, that were a man to *chuse*, it is against A, who *is* guilty, that he would level the punishment, much rather than against B, who is not guilty. He would do this for the ease of his own moral feelings. He would do it to save that dissatisfaction, which reasonable or unreasonable, is sure to arise in the breasts of the multitude, from the principles above set forth. A dissatisfaction, which increases the sum of evil, introduced by the punishment, and which therefore is to be deducted from the total account of the utility of the measure.

But if, after all, the evil of the punishment in this mode can be less than the evil of the mischief, and there be no other way in which the mischief can be suppressed, at a less, or equal, expence of punishment; the magistrate has but one mode of conduct to pursue, if he would do his duty. He must punish the innocent, or betray his duty.

One

One consideration may help to reconcile him to this irksome necessity. Taking the whole sum of innocence into the account, that is, the whole number of innocent persons affected, either by the infliction of the punishment, or the continuance of the mischief, it will appear, that less detriment accrues to, less suffering is laid on, innocence by this compliance, than would be laid on, or accrue to it, in refusing to comply. Innocence suffers, it is true, by the infliction of punishment; but innocence would also suffer, and that by a supposition to a degree still greater, by a continuance of the mischief; for if the evil of the mischief be not greater than the evil of the punishment, no punishment, no act of power, ought to be exerted. The benefit of the measure calculated for relief, will not bear the expence of it\*.

\* Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. Beccaria.

He who should extend, or think I meant to extend, this idea so far as to confound innocence and guilt, or to mete out to both alike, in any case where a distinction can possibly be drawn, the same measure of favour or discountenance, would either argue very ill himself, or make a very unfair use of my principles. It is only the impracticability of severing the innocent from the guilty, nor even that singly, that can justify the involving of them in one common punishment. Not to make a distinction, where it is practicable to make a distinction, between guilt and innocence, is to destroy the efficacy of punishment as a spur to action. To punish the innocent, where the continuance of the mischief to be prevented by punishment, would not be a greater evil to the innocent, than the evil they suffer by the punishment, we have already said, and must again repeat, would be an arbitrary and cruel exertion of power.

Under

Under these restrictions let us apply this maxim to the act before us.

There are but two ways of punishing:—individually, or collectively. To punish individually, you must punish judicially; and to punish judicially, there must be a trial. But it is vain to try, where you are sure before-hand there can be conviction. There can be no assurance of conviction, be the guilt ever so indisputable, where the probability is, that the jury are accomplices with the culprits. Accomplices will not convict one another, when they can avoid it. Juries will not convict, as for an act of guilt, for an act in which they are persuaded in their conscience, there is *no* guilt, much less for an act, which they are persuaded is meritorious. Could it be expected, that a jury of Jacobites would convict a man of high treason for adhering to the Pretender? Conceive the Pretender, by a miracle of an avenging deity, placed on the throne of these kingdoms, would a free jury of

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whigs convict a man of high treason for adhering to king George? Just as soon would a jury of Bostonians have convicted the Mohawks of guilt for destroying the tea.

In disproof of this last assertion, indeed, a precedent is cited: the acquittal of captain Preston was urged in an address to the house against this very bill, as a proof that the due course of law held out redress for any injury sustained in America: but however it may seem, on a superficial view, a little attention will convince us, that the cases are not parallel. There is surely a wide difference between absolving a man, who being charged with an act of *enmity*, appears after all not to have committed it; and the destruction of a friend for the very act, whereby he proved himself a friend.

In such a case it can hardly be conceived, that those who contend against collective punishment can really mean any thing but universal impunity:—thinking

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# Sect. VI. TO THE COLONIES.

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the Americans in the right to resist, *quo-  
cunque modo*, they of course are against  
their being punished at all.

But when it was already decided, that  
they should be punished,—and such was  
the opinion of the whole house:—when  
the only question was *how* they should be  
punished, it is but *actum agere* to contend  
against this, or that mode of punishment,  
without attempting to point out a better.  
Supposing it even erroneous, or criminal, to  
have adopted compulsive measures; yet to  
urge that as a new crime, which was the  
necessary consequence of such a resolution  
once adopted, is but a piece of party disin-  
genuity, easier to be excused than justified.

A discriminating punishment we have  
already seen could not be exercised, because  
all conviction of the guilty appeared im-  
possible. A collective punishment became  
therefore necessary; that is, a punishment  
which involves, to a certain degree at least,  
the innocent with the guilty.

Cc 2

Nor

Nor is this mode of punishment, however it may have been exclaimed against on the present occasion, unknown to or infrequent in our law.

By the institution of *frank pledge*, attributed, I think, to Alfred, every man was made responsible, that is, was to a certain degree punishable, for the delinquency of every other man in the same decennary.\*

The whole system of the law on forfeitures for high treason is built upon this principle of collective, or vicarious, punishment. And the only objection to this application of the principle in this particular case is, that here it is easy to sever the father from the children, the guilty from the innocent.

Corporations, where this severation cannot be made, are often punished for the misdemeanors of their members. And no man thinks it unjust.

\* See Blackstone's Commentaries, vol. i. p. 113.



Hundreds are charged for damage sustained in the maiming of cattle\*, &c. and for robberies committed between sun and sun†.

Husbands, in the opinion of Hawkins‡, are answerable for their wives in the pecuniary penalty inflicted by a penal statute.

A master is indictable for a nuisance done by his servants §; he is responsible for his servant in publishing a libel ||.

Though a sheriff cannot be punished as for a felony, for a voluntary escape of a felon permitted by the goaler; yet, “whether the escape be voluntary, or negligent, the sheriff may be indicted for it so as to subject him to a great fine and

\* 9 Geo. I. c. 22. s. 7.

† 27 Eliz. c. 13. 29 Geo. II. c. 36. s. 9.

‡ See 1. p. 3.

§ Lord Raymond, 264. Burn on Servants, xxiii. 146. Bacon's Abridgment, tit. Master and Servant.

|| See three strong cases, in 2 Sess. Cases, 33.

"imprisonment, for the offence of his  
 "goaler, though not to make him guilty  
 "of felony \*." And this it should be ob-  
 served, is a much stronger case than that  
 of a master being criminally responsible for  
 the act of his servant, especially if a me-  
 nial servant, over whom he is supposed to  
 have a much greater and more constant in-  
 fluence, than what a sheriff has over his  
 goaler.

By the conventicle act †, in case of the  
 poverty of one person present at a conven-  
 ticle, and therefore subject to a fine of five  
 shillings for the first, and ten shillings for  
 the second, offence, the penalty is directed  
 to be levied on *any other* person present, so  
 that no one bear more than ten pounds.

By the Mutiny Act ‡, if a soldier de-  
 stroys game, the commanding officer for-  
 feits twenty shillings ; and if, after con-

\* 1 Holt. C. P. 597. Dalton, c. 106. Doc-  
 tor and Student, 42.

† 21 Car. II. c. 1. s. 2, 3.

‡ See Dialogue on Game Laws, 34. 14.

"viction,

viction, he does not pay the forfeiture, within two days of the demand being made by the constable or overseer, he loses his commission.

It appears then, that the principle adopted by this act, the principle of applying collective and vicarious punishments, of involving the innocent with the guilty, whenever such involution is necessary to the suppression of mischief, is warranted by the general spirit and practice of our law, as well as is this case justified by necessity †.

In farther defence of the act in question, let it be added, that the primary intent of it was not that either the innocent should suffer, or the guilty; but that the innocent should stand up and join in measures for compelling the guilty to repair the mischief they had done, and to return to

† See many other cases cited in Yorke's Consideration on the Law of Forfeitures for High Treason.

obedience to the laws. If the parties supposed innocent did this, no punishment at all would ensue; if they did not, if they tamely fate still, and gave way to the enterprizes of the guilty, they ceased to be innocent: they became accomplices with the guilty.

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S E C T. VI.

*Act for the impartial administration of justice in the case of persons questioned for any act done in the execution of the law in Massachusetts Bay.*

THE preamble of this act sets forth, that an attempt had lately been made in Massachusetts Bay to throw off the authority of parliament, by resisting avowedly, and by open force, the execution of certain of its acts: that it is of the utmost importance to the general welfare of the province, and the re-establishment of lawful authority, that neither the magistrates acting in support of the laws, nor subjects assisting them therein, should be discouraged from the proper discharge of their duty by an apprehension of their being tried before persons who do not acknowledge the validity of the laws, in the execution of which, nor the authority of the

the magistrates in support of whom, such acts had been done.

It is then enacted, that if any inquisition, or indictment shall be found or any appeal sued against any person for murder, or other capital offence in Massachusetts's bay; and it shall appear by information given upon *oath* to the governor, that the fact was committed by the person accused, either in the execution of his duty as a magistrate, for the suppression of riots, or in support of the laws of the revenue; or in the discharge of his duty as an officer of revenue—or under the direction, or order of a magistrate: and if it shall also appear by the satisfaction of the governor, that an indifferent trial cannot be had within the province, then the governor, with the advice of *his council*, may send the party accused to be tried either in some other colony, or in Great Britain.

The witnesses, whose evidence shall be desired, either by the prosecutor, or the culprit,

culprit, are to be bound over to give evidence at the time, and place of trial. And the governor is to assess a reasonable allowance to the witnesses so bound over: to be paid by the officers of the customs.

The witnesses are to be free from all arrests, and restraints, in any action or suit, during the time of their going to, staying at, and returning from the place of trial.

The persons accused are to be admitted to bail. Judges are to postpone the trial of such persons, and admit them to bail for a reasonable time, if they signify their desire of applying to the governor for the benefit of this act.

Care is taken to obviate the failure of justice from indictments quashed, or adjudged bad upon demurrer.

The act is to continue for three years.

A more strictly necessary act than this can scarcely be imagined. Yet the terms in which it has been spoken of are perfectly astonishing: those who employed them,

them, one should think, had together with all temper put away all shame. In their petition to the king the American Congress express themselves perfectly satisfied that the effects of it will be "that offenders will escape legal punishment." In their address to the "good people of England" they go so far as to call it, "an act to protect, indemnify, and screen from punishment, such as might be guilty even of murder, in endeavouring to carry the oppressive edicts of parliament into execution \*."—In their address to the inhabitants of the colonies they rise if possible still higher in their extravagance, and style it "an act for indemnifying the murderers of the inhabitants of Massachusetts Bay †."

In the act we have seen, what can there be to deserve these frantic appellations?—What is it that it does, more than con-

\* See Votes and Proceedings of the American Continental Congress, p. 37.

† See ib. p. 59.



vey a general security to the officers of the executive power?

It does not alter the mode of trial; the trial is still to be by a jury. In this case indeed, the jury cannot be of the vicinage. But that circumstance is, or is not an advantage, as it may happen. It may, or may not, be right that they be "next neighbours." It is, and must always be right that they be such, as to use the words of an antient statute, shall be "most sufficient, and least suspicious \*."—Were an officer of the revenue to be accused of murder in the discharge of his duty here in England—would it be right to have a jury from a town inhabited *only* by smugglers, merely on account of their being of the vicinage?

In disputes between individual and individual, though the subject matter be of no higher importance than some trifling claim of property, or a demand of satis-

\* 28 Ed. I. c. 9.

faction

faction for some petty personal injury; if it appear, that "a cry is raised; that the "passions of the multitude are inflamed; "that one party is popular, and the other "a stranger, and obnoxious \*:" it is the constant practice under our law, by means of some expedient or other, by the authority of some court or other, to change the scene of trial, and the persons of the triers. Can there be less reason for such a practice in a case of blood, where the cause of one man is the cause of the very people, who, were it not for such provision, would be to try it?

Nor even in capital causes is a provision of this nature without example in our statute book. Murders and felonies, committed in any part of Wales, may be tried in the next English county †. By a statute of George the Second, offences of high treason committed in certain counties in Scotland might be tried in any

\* Blackstone's Comm. III. 384.

† 1 Strange 553.

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*other* county in Scotland \*. And if the whole kingdom of Scotland had been as warmly attached to the interests of the Pretender, or as resolute to deny all obedience to the lawful sovereign as those counties were, who can doubt but that the legislature would have gone further, and shifted even into England the scene of trial? Nor let it be forgotten, that in the case of Scotland, the legislature exerted its power for the stern purpose of inflicting punishment on the guilty: whereas in the act before us, the same power is exerted for the benign end of saving the innocent from undeserved, or the guilty from excessive punishment.

It may be said indeed that America is removed at such a distance from England, that the cases are not parallel. But this local difference was neither created by parliament, nor is it changeable by it. Parliament can neither swallow the wa-

\* 21 Geo. II. c. 19.

ters of the Atlantic; nor build a bridge over them. Nay farther,—if any one colony can be found, where an indifferent trial can be had, it is not required that either the culprit or the witnesses should be made to cross the seas.

It has been urged, that the acquittal of captain Preston is here at least a case in point, to prove the needlessness of the precautions taken by this act against partiality in the local judicature. But it is not so by any means.—At *that* time the judges assumed as the ground work of their charge—that Preston was in the king's peace:—was doing a legal act, in discharge of a legal duty:—they from thence deduced, that he was illegally assaulted; illegally put in fear of his life; and therefore acted only *se defendendo*. They must now assume another principle: the stationing of soldiers in the colonies is now declared illegal and unconstitutional: the appointment of a board of customs is

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now declared illegal and unconstitutional: the tax to be levied by the officers of that board is now declared illegal and unconstitutional: the order, by which the governor and council may require the aid of the military, must now be illegal and unconstitutional, since the appointment of the council itself is declared to be so.

If it be assumed as law (and in the present temper and disposition of things, if the judges do not lay it down as law, it is manifest the jury will assume it) that the King has no right to send troops to Boston; on that supposition, neither can the officer of those troops have any right to place sentinels; nor can a sentinel so placed be said to be in the King's peace. Nor can any act he does in defending his post be a legal act. If it be laid down as law, that the board of customs is an illegal tribunal, and the tax they are to levy an illegal imposition, then the officers of the customs

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are neither more nor less than robbers; the exaction of the tax is an act of robbery; and no act done in defence of the officers, or in the exaction of the tax can be legal. If it be laid down as law, that the council is an illegal body, then an order of council to enforce the laws, or requiring the support of the military, is an illegal act, and every man who should come to his death in consequence of that order, would indeed be murdered: every man who obeyed that order would be a murderer.

It follows, that the same judge and jury, who assuming one principle, acquitted captain Preston, being now obliged to assume a contrary principle, must convict every man who, in similar circumstances, is brought before them.

I see not therefore how it is possible to help concluding, that parliament was under an absolute necessity, either of repealing all its other laws, and of recalling  
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ing the bodies, whether civil or military,  
it had commissioned to enforce them: or  
else of supporting those bodies, and en-  
forcing the provisions of those former  
laws by the further provisions of the pre-  
sent.

## S E C T. VII.

*The act for the better regulating the government of Massachusetts Bay.*

**T**HAT, at the time of passing this act, the property, or the persons of individuals were safe in the province of Massachusetts Bay, will, I think, hardly be pretended: that no subordination to the laws of England could be maintained, no compliance with them enforced; that the penalties by which they were guarded might be safely defied, and therefore the execution of the commands contained in them openly obstructed, was the *boast* of every New Englander who aimed at popularity. It must then have happened that those whose duty it was to preserve good order in the provinces, and to see a due obedience paid to the laws of parliament, either did not make a proper use of the powers with which they were entrusted

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ed for that purpose, or really had not powers sufficient to maintain "the internal welfare, peace, and good government" of the province, or what parliament at least chose to call "the just subordination to, and conformity with the laws of Great Britain." This impotence of those who were to execute the laws, was a thing neither new nor momentary, it had been daily increasing for years. It was therefore natural to look for the cause of this weakness, not so much in the good or ill conduct of this or that governor, as in the original constitution and frame of the government itself. That there were many and leading defects in it had been confessed, and complained of by those, whose station enabled, and whose duty obliged them to examine it most attentively\*. Here then it was that parliament fought the cause of the present

\* Mr. Pownall, Sir Francis Bernard, Messrs. Hutchinson and Oliver.

disaffection which prevailed in New England: and it therefore determined to preserve the authority of Great Britain, from that time forward, by new-modelling the government of the province.

Let us examine the defects complained of in the government as it stood previous to the passing of this act, and the remedies this act has applied.

King William, we may remember, when he granted a new charter to the province of Massachusetts Bay, put the nomination of the governor, lieutenant-governor, and secretary into the hands of the crown. This was a severe blow to that spirit of democracy for which this province had been distinguished from its first foundation. But he left the court of assistants, or council, as he found them, eligible, and in case of a misdemeanor, amoveable by the general assemblies.

At the same time he attributed to this council, thus eligible and amoveable, functions which it should seem ought not

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to be exercised by one and the same body. This council is first a council of state, that is, in some cases it is a *branch* of the executive power; for its *consent* is necessary to the performance of certain acts by the governor: in many more it is an *assistant* of the executive power, for its *advice* is to be asked at least, if not followed, previous to many other acts to be done by the governor. And this same council is besides a constituent branch of the legislature.

Many inconveniences had it seems arisen from this union of functions so distinct in *one* and the *same* body of men\*. To these inconveniences, whatever they be, the government is still left open; no remedy is provided by this act.

Yet it was not perhaps unnatural to expect, that in new regulating the government of this province, one object would have been to have brought it as near as

\* See Administration of the Colonies, vol. i. p. 118.

might be to the model of the constitution which obtains in the mother-country. Had this object been in view, it is probable, that what so many governors had recommended would have been complied with. Two councils would then have been appointed: one a constituent branch of the legislature, equally independent of the governor and the people\*. The other a council of state, to be appointed, and removeable either directly by the king, or by the governor in the name of the king. And that this last council might be able to supply instruction relative to every department of administration, we might have expected to have seen it composed promiscuously of men taken from every department; of some in military, of others in judicial stations; of others again in each of the two branches of le-

\* "A true middle legislative power, appointed by the king for life, and *separate* from the *privy council*." Bernard's Letters, p. 36.

gislative,

gislative. But as we have before said to this essential defect in the constitution of this government, the act before us has applied no remedy whatever.

The election of this council by the house of representatives had been frequently complained of by different governors \*. They had found it highly inconvenient, that what ought to be the middle should be subordinate to the lower branch of the legislature. And still more so, that those who were to advise and assist the governor in the execution of the laws, and in the maintenance of the authority of Great Britain, were dependent on that very assembly, which was ever ready to counteract those laws, and call that authority

\* "In this province (which though royal in the appointment of a governor, is democratical in all its other parts, especially in what is frequently regretted, the appointment of the council) the springs of government are so relaxed, that they can never recover their force again by any power of their own." Bernard's Letters, p. 43.

in question. These inconveniences had been particularly felt since the heats struck up by the stamp act. From that moment, to be known, or believed, or even to be suspected of being inclined to support the supreme authority of parliament, or the constitutional rights of the king in the provincial government, was sufficient reason for exclusion from the provincial council\*. Officers who, by their particular functions and their official knowledge of public business, were almost necessary to that body, considered as a council of state, were excluded: though the charter supposed them entitled to a seat there, in virtue of their offices. So much did these popular elections weaken the authority of the counsellors; so thoroughly dependent did it render them on the house of representatives, "that nothing was

\* See proofs of this in Bernard's Letters, p. 98, 99, 100, 101, and in Hutchinson's and Oliver's Letters, p. 20, 21.

" more

"more common, it seems, than for the  
 "representatives, when they found the  
 "council a little untractable at the close  
 "of the year, to remind them that May  
 "was at hand \*." *or live wither*

At first sight it should seem evident, that  
 this dependence of one branch of the legi-  
 flature upon another, tended to defeat all  
 the advantages which should be derived  
 from the division of the legislative power :  
 that it tended to defeat that very stability  
 of constitution which the Americans talk  
 so much of, and praise so highly, with-  
 out seeming to know by what means it is  
 to be effected; because it tended to de-  
 prive the intermediate branch of the legi-  
 flature of that power of resistance which it  
 should employ alternately against the pre-  
 ponderance of either of the other two:—  
 by depriving it of that free agency, with-  
 out which that power cannot exist; and

\* See Hutchinson's and Oliver's Letters, p. 32.

of that dignity and respect, without which it cannot operate.

The act before us applied a remedy, such as it is, to this evil. Or rather it created another evil to substitute in the room of it.

Henceforward the members of the council are not only to be named by his majesty, but are to hold their offices no longer than during *his pleasure*. This indeed was taking away their dependence on the democratical part of government; but it was neither rendering them independent, nor securing them that respect which alone could make them useful. If they were liable to contempt whilst they were considered only the instruments of the *house of representatives*, they must expect to meet, as indeed they have met with abhorrence, as well as contempt, appearing to be the instruments of the *crown*. No doubt the outrages countenanced, or at least connived at, under the former democratic government, did require for the present,



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that the intermediate branch of the legislature should throw its weight into the scale of the crown. But then that weight should have been thrown in voluntarily, in which case the momentum of it would have been something in point of influence as well as power. Such resistance as it might in that case give to the extravagances of the democratic party, might then have been considered as the effect of internal conviction. The belief of that conviction might then have operated on others.

Had they been appointed for life, or at least had proofs and conviction of malpractice necessarily preceded their removal or suspension, they would at once have acquired a degree of dignity, which they could never acquire whilst they were elected by the representatives; and a degree of confidence which they never can hope to acquire whilst they are removeable at the pleasure of the crown. And they would, besides, have had something worth contending

tending for themselves; they would have had a real and a permanent interest, sufficient to incite them to labour earnestly and effectually, to check the encroachments either of the crown or people\*.

This second defect in the law before us was perhaps a consequence of the original error, of confounding together the

\* Mr. Oliver observes, the honour of being a legislative counsellor could not be hereditary in Massachusetts Bay, because estates are partable after the death of the proprietor: but recommends it warmly that they be appointed *quam diu se bene gesserint*. Or as a farther check upon the exorbitance of the democratic power he proposes an order of noblesse, who should elect counsellors out of their own body, as the Scotch peers elect out of their body lords of parliament, reserving only a negative to the crown. See Letters, p. 31, 32. Such a scheme, coming from a man so well acquainted with the country, surely deserved attention.—It should seem besides to be of such a nature, as either to meet with little, or overcome all resistance. Especially if the crown had given up—as I think it might safely have done—the right of putting a negative upon all vacancies to be supplied, after the first nomination.

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legislative council, and the council of state.

From the same source perhaps sprung another defect. Among the *qualifications* of the counsellors, they are required to be *proprietors* of land, *or* inhabitants within the province. A member of the council of state stands in a responsible office:—many officers of the crown, who are mere inhabitants, may with propriety, nay ought perhaps to be called to this board: but surely the members of the legislative council ought to have a *natural*, as well as a *political* relation to the country. Territorial possessions seem an indispensable qualification to a member of the legislature.

Hitherto the act seems to have considered this council merely as a council of state. And neither requires such qualifications as should have been required of, nor gives such a degree of independence as should have been given to, members who were to form a distinct

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a distinct constituent branch of the legislature.

In the next provision it seems to consider it merely as a legislative council, and takes from it the functions which had before been allotted, and for ought appears, should have been continued to the council, considered as a council of state. Their concurrence is no longer necessary to the nomination or removal of the judges of the inferior courts of common pleas, commissioners of oyer and terminer, attorney-general, provost, marshals or justices of the peace: nor to the nomination, though it be to the removal of a sheriff. The appointment of a certain number of persons, a certain body, without whole advice at least, if not their consent, the governor should do no act of government, seems to have been generally considered as a useful guide in the exercise, as well as a salutary check upon the abuse of power. At least it increases the number of persons immediately

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immediately responsible. And who is the governor that would not rather trust to the official information and advice of a body of men acting in a responsible character, than to the private advice which may be whispered in his ear, by the very same persons, acting only in their private and individual capacity? Whatever advantages the governor might derive from the information or advice of such a responsible body; whatever check he might be under from the necessity of obtaining the concurrence of such a body in the nomination of those who are to exercise the judicial power, are taken away by this act. The consent of the council is not necessary: nor is the governor bound to ask, nor they to give their advice.

Indeed it appears, that the intention of the legislature was to render the officers of justice, as well as the council, entirely dependent on the crown. Under the former government the judges were dependent on the deputies of the people for a

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temporary, wretched, and arbitrary support \*. Was it reasonable to expect that judges, under such circumstances, should firmly maintain the rights of the crown, or enforce the laws of trade, or in any case faithfully discharge their duty, in opposition to the overbearing spirit of a democracy, or even to the passions and prejudices of the multitude? Whilst the judges were kept in such a state of dependence, could it even be expected that the rights of individuals would be better protected than the rights of government? Must not all redress of wrongs done by a more to a less powerful subject be desperate and unattainable? It might well be expected to happen, and accordingly we learn from the best authority, that it actually did happen, as formerly in the county courts in England — “ That all business of any moment was car-

\* See Administration of the Colonies, vol. i. p. 111.

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“ruled by parties and factions; and that  
 “those of great power and interest in  
 “the country did easily overbear others  
 “in their own causes, or in such where-  
 “in they were interested, either by rela-  
 “tion of kindred, tenure, service, de-  
 “pendence, or application \*.”

What remedy has the act provided for  
 an evil of so dangerous a nature? None  
 at all. Or, at best, mistaking the re-  
 verse of wrong for right, it has only sub-  
 stituted one evil in the place of another.  
 Not a syllable is said about the salaries  
 of the judges. They are left, as to this  
 point, so far as this act extends, in the  
 same state of dependence as before. The  
 crown indeed does now issue salaries  
 for them. But it is a voluntary, arbit-  
 rary act of the crown. It is no legal estab-  
 lishment. And it seems to the full as  
 dangerous, that the judges should depend

\* Quoted from lord chief justice Hale, in the  
 Administration of the Colonies, vol. i. p. 110.

on the crown, as on the people, for an arbitrary support.

To lessen their dependence on the people, it is enacted, that the judges shall not only be appointed by the deputy of the king, but shall hold their office, the inferior ones, during the pleasure of the same deputy, the superior during the pleasure of the king. This indeed is strengthening the power of the crown, but it is weakening the security of the people. The impartial administration of justice will no longer be impeded by the cabals of faction, but will it not be liable to be impeded by the intrigues of ministers? What then has the community gained by this change?

Those who had so strongly represented to government the necessity of making the judges independent of the people, did not advise their being made as dependent on the crown. They advised, that adequate and fixed appointments should be assigned them; that they should hold their places, not during the pleasure either of

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## SECT. VII. TO THE COLONIES. 421

the king or of the governor, or of the assemblies, but as the judges hold their places in England, *quam diu se bene gesserint*. Their advice was, that the king should appoint them, but the law *alone* should displace them.

But what check would there then have been on the provincial courts, if the judges were appointed for life? That check which the constitution points out. Appeals should have lain from the decisions of the provincial courts, but not to a court, which exercises an *usurped* jurisdiction, to which it is in every light incompetent; not to the king in council, but to the court of king's bench in England.

The next thing necessary towards insuring the impartial administration of justice was to regulate the mode of appointing juries. Under the former government, we are told, the mode of electing the grand juries was liable to many objections. They were chosen and returned by the freemen, on notice sent them by

the clerk of the court; and out of the perquisites of the court they had a salary of three or four shillings a day\*.

"This method lay open to management;" so at least we learn from a great law officer of the province: "whoever pleases (says he) nominates them at our town-meetings." As a proof how very open they lay to management, he adds, "that by this means one who was supposed to be a principal in the riots of the 10th of June (preceding his letter) was upon that jury, whose business it was to enquire into them†.

That an institution, which was not only so liable to *abuse*, but had actually been thus *abused*, called for reformation, will, I suppose, be readily allowed. To establish that reformation is a business of a large part of this act. Particular directions

\* See Appendix to Neale's History of New England, vol. ii. No. 4. Article Juries.

† See Hutchinson and Oliver's letters, p. 31.

are given about making out the lists of persons *qualified* to serve on juries; but as to the qualification itself, the act is totally silent. About the time of issuing the summons for jurors; about the manner of supplying the want of jurors, where a sufficient number do not appear, or having appeared, are reduced to an insufficient number, by challenges, or otherwise; about the mode of ascertaining the number, and of drawing the names of jurors, the act is full and particular: and appears to be liable to no objection.—

Not so with respect to the *officer* who is to summon the jurors. They are to be summoned by the *sheriffs*.—Names are powerful things. — Nine tenths of the world are governed by them. Had the act provided for the sufficiency and independence of the officer, who is to summon juries, it would have been a matter of prudence, and allowable policy, to call him a *sheriff*; but was it allowable to give this name to a needy dependent, liable to

be dismissed at any time, for no assignable reason, by the servant of the crown, and a council which itself is only an instrument of the crown? A sheriff in England must have lands in the county where he serves\*. For ought that appears by this act, a governor may name his own footman to be sheriff. A sheriff in England is appointed for a year†; for ought that appears by this act, one man may be sheriff for life. A sheriff in England is to take an oath of office‡; no oath, no engagement whatever, is prescribed by this act. A sheriff in England is punishable by fine, or otherwise, if proof be given of negligence or partiality, in the return of juries§;

\* 9 Ed. II. st. 2. Ed. III. c. 4. 4 Ed. III. c. 9. 5 Ed. III. c. 4.

† 9 Ed. II. st. 2. 14 Ed. III. c. 7. 23 Hen. VI. c. 8.

‡ 3 Geo. I. c. 15. f. 18.

§ 28 Ed. I. c. 9. 7 & 8 Will. III. c. 32. 3 Anne, c. 18. 4 & 5 Will. and Mary, c. 24. 3 Geo. II. c. 25.

no fine, no punishment whatever, is denounced by this act against the negligence, or partiality of a sheriff. Yet it is remarkable, that the same act imposes a fine on the constable, if he give in false lists of persons qualified to serve as jurors: he is also punishable if he *neglects* to give in true lists.—But suppose the sheriff to *falsify* these lists: suppose him to impanel, or return persons to serve in juries, who are not named in these lists, to what punishment is he liable?—To be displaced by the governor and council. He would meet this punishment, no doubt of it, if such falsification, or untrue return, be disadvantageous to government, or hurtful to the governor or his friends\*.

This

\* In speaking of the council—this act provides, that the members shall take the same *oaths*, &c. as heretofore.—In speaking of the sheriff, no such provision is made.—None of the provincial laws, if any such there be, which fix the qualification for a sheriff, or his oath of office, are confirmed by this

This act then, so far as it relates to the nomination, and functions of the sheriffs, seems to be at once unjust and impolitic :— unjust, because it does not secure the rights of the people ; impolitic, because it defeats one at least of its own ends.

For the ends which the legislature had, or ought to have had, in view, were first to secure to the colonists, and to convince them, that it was intended to secure to them, an impartial administration of justice, by providing effectually for the return of a sufficient and indifferent jury.— And in the next place to convince them, that the legislature, in the changes effected in their constitution, meant only to bring it nearer to what themselves boast to be its original model, the constitution of the mother-country.—Now will the people ever believe, that a jury summoned by such an officer as this, who gives no pledge, no

this act, or even so much as noticed —Nor is the governor required to take notice of them.

security

Sect. VII. TO THE COLONIES. 427

security whatever to the public for his good conduct, who *may* be, for ought that appears, without a foot of land in the province, who takes no oath, enters into no recognizance for the impartial discharge of his duty, and who holds his place at the will of the governor, will be a sufficient and indifferent jury? Will not any jury he can summon in any cause, where the rights of the crown, or the interests of its officers, are concerned, be at least suspected? Will they hereafter trust to your professions of wishing to communicate to the colonies, the blessings of the British constitution? Will they not resent as a mockery, this affixing the name of an officer respectable in England, to a creature so totally dissimilar in America? There is no more resemblance between an English sheriff, and the sheriff appointed by this act, than between a *consul* commanding the troops of the most powerful state in the world, and a *consul* settling disputes about figs and raisins, at Smyrna.

Another

Another object of this act is, to regulate the annual and occasional meetings of the freemen. These meetings, it seems, had been perverted from the original purpose for which they were instituted, and, instead of confining themselves to their own municipal business, "had been mislled" says the act, "to treat upon matters of the most general concern, and to pass many dangerous and unwarrantable resolves."

To remedy this abuse, two provisions are made; both of which appear impolitic, and one of them impracticable.

It is enacted, that no occasional meeting, that is, no meeting, except the annual ones for the election of officers, and those for the election of representatives, shall be summoned without the consent of the governor. This, no doubt, is practicable, but is it just or politic? Thus much is, I believe, certain, that here in England, the frequent meetings of the gentry and freeholders, have always been considered



dered as one of the greatest supports of our liberties.—Our petit and grand sessions, our assizes, are upon this account, as well as others, of real and salutary importance; nay, if the Restoration is to be ranked among the national blessings, even cock-matches and horse-races may claim some share of the praise of utility: there it was the royalists held their consultations\*. Nor was the prohibition of these diversions the least galling act of Cromwell's tyranny. Nor is there perhaps a measure that would be more likely to rouse the jealousy, or inflame the passions of Englishmen, than an attempt to put the power of meeting, or the exclusive prescription of the matters to be canvassed when met, in the arbitrary disposition of the servants of the crown.

No doubt it was true, as the act asserts,—"that great abuses had been made of the power of calling such meetings:"—

\* Dalrymple's Memoirs, vol. i. p. 74.

No doubt "the inhabitants had passed  
"many unwarrantable resolves;" but  
does it therefore follow, that free meet-  
ings should be disallowed, because free  
meetings had been abused?—What is it  
that may not be abused?—Convivial meet-  
ings may be abused; they often are so;  
would you therefore pass a law, that no  
man should give or receive a dinner, with-  
out the permission of government? Bring  
the case nearer home: however dange-  
rous and unwarrantable the resolves of the  
town-meetings may have been in Massa-  
chuset's Bay, they were certainly neither  
more dangerous, nor more unwarrantable,  
than many resolves passed in the town-  
meetings at London. Why did not go-  
vernment apply the same remedy to the  
same evil, existing and operating under its  
own eye?

He would surely be mistaken who sup-  
posed, that the town-meetings *raised* the  
spirit of discontent: they did not raise, they  
found it. Men were not called together to  
meet,

meet, and pass resolves, in order that they might grow discontented with government; but they met and passed these resolves because they were already discontented.

Where the measures of government are directly contrary to the interests, and destructive of the happiness, of the whole community, no doubt public meetings are dangerous to government; and for that very reason they are beneficial to the community, grievances are mutually communicated; plans of redress are concerted; support is mutually promised.— This plea, I suppose, will not be set up in defence of the provisions of this act; yet upon no other plea can I conceive them to be defensible. For where the measures of government are levelled not against the interest of the community in general, but against the views and interests of a *faction* only, it is there at most an equal chance, whether public meetings will, or will not be attended with inconvenience. But suppose the worst: suppose the prevailing  
faction

faction for a time to take the lead, what then? Why opinions will be propagated; resolutions will be passed, which are unwarrantable; and which, if carried into execution, would be dangerous. This has been the case in New England; this has been the case in *London*. But to opine or resolve is one thing; to act in consequence of those resolutions, or opinions, is another.

The citizens of *London*, for instance, resolved in some of their public meetings, that the last parliament was *no* parliament:—nay, they went a step farther, they declared as much in an address to the throne. What effect did this declaration produce? The parliament sat as usual, passed its acts as usual, and was obeyed as usual. One gentleman went farther;—he refused to pay a tax imposed by that parliament. What was the consequence? The officers appointed to collect the tax, seized his goods for non-payment, as they would have seized mine, or any other persons, who from any other cause or motive had refused,

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refused, or neglected, to pay the tax. The gentleman applied to a court of justice for redress against the officers. The court justified the officers, and the gentleman paid the expences of the suit. What shock did government receive from thence?

The people of Massachusetts have declared the counsellors, or assistants, appointed in conformity to the act before us, to be no council.—They have assembled, and forced the new counsellors, as many of them as they could get at, to engage themselves by oath to throw up, what the insurgents called an illegal office.—“See here,” it may be said, “the dangerous effects of public meetings.” But the public meetings were prohibited by this very act, previously to the election of these very counsellors. “True,” it will be answered, “but the act was not enforced the public meetings assembled notwithstanding.” And why was it not enforced?—“Because government was too weak to enforce it.” Here then

was the defect, in the weakness of government; and here only the remedy should have been applied. The same strength which would have sufficed to suppress the public meetings, would have sufficed to give activity to the new council; and had the new council been able to act, there would have been nothing to fear from the public meetings.

In general, that government must be very weak, or very arbitrary, which has any thing to fear from public meetings; or which makes a point of suppressing them.

It is farther enacted, that at the annual meetings for elections, no other business shall be done than that of the elections; and that at occasional meetings, no other business shall be done, except the business expressed in the leave given by the governor to convoke such assemblies. This provision appears to me to be as little consonant to justice, or to policy, as the former; and withal impracticable.

Had

Had it indeed been confined to the metropolis, it might have been said, that the governor \* was always at hand, always accessible; that it would be easy to explain to him the business intended to be done at the meeting, and if that business were constitutional, he would certainly consent to it; but the fact is, that the provisions extend to *all* the towns and districts in the province. Now these towns are some of them at one, two, or even three hundred miles distance from the capital. Almost all the municipal business is regularly done at these town-meetings. Is it not peculiarly hard, that all the municipal business of these towns should be at a stand, 'till dispatches can be sent to his excellency the governor, explaining the circumstances of each particular business to be canvassed;

\* Wherever the word *governor* is used in the remarks on this act, it is used to mean, the person who *presides* in the province for the time being; whether governor, or lieutenant-governor. The provisions of the act being so extended.

till his excellency shall have read these dispatches ; shall have sent back perhaps for explanations ; shall at last, having made himself master of the business, sent back other dispatches, granting licence to meet ? What must be the authority of a government reduced to such precautions as these ? Would it be thought to add greatly to the security of the throne, if not a vestry could be summoned in England without licence from the king ?

The policy of this provision seems to stand upon no better footing, than the justice of it. A town-meeting assembles with leave of the governor ; its business is precisely marked out. In the course of the business the friends of government observe a turn in the tide of the popular opinions ; they wish to take advantage of it ; to propose resolutions, to form associations for counteracting the manœuvres of the factious, and ill disposed ; for supporting government, and for giving force, and efficacy, to the laws.—“ No,” says this



this act, "you shall not do it: this is not  
 "the business of the meeting; it is not  
 "expressed in the licence to meet; your  
 "resolutions are null; your associations  
 "illegal.—

The best defence of this provision, per-  
 haps, is, that it is impracticable.—When  
 the assembly is met, either for elections,  
 or for any municipal purpose, who shall  
 withhold them from proceeding to such  
 business as they see fit? In all assemblies  
 the will of the majority, controuls the  
 will of the whole. If the majority of these  
 assemblies be *not* disaffected to govern-  
 ment, there would be no danger in leav-  
 ing them free to vote and resolve as they  
 pleased. If the majority be disaffected,  
 there will be no means of preventing them  
 from voting and resolving as they please,  
 unless by preventing their coming toge-  
 ther at all.

## S E C T. VIII.

*The Quebec Act.*

THE first object proposed by this act is to describe the boundaries of what is hereafter to be called the province of Quebec. For it seems all that had been hitherto done towards settling either the limits or the government of this colony, since its first acquisition, was by a proclamation issued by the king in the third year of his reign. And so wisely and carefully was this proclamation drawn up, that (as the act sets forth) "a large  
" extent of country, within which were  
" several colonies and settlements of the  
" subjects of France, who claimed to remain there under the faith of the treaty  
" of Paris, was left without any provision being made for the administration of civil government therein; and  
" certain parts of the territory of Canada,  
" where

“where sedentary fisheries had been established, and carried on by the subjects of France, inhabitants of the province of Canada, under grants and concessions of the government thereof, were annexed to the government of Newfoundland, and thereby subjected to regulations inconsistent with the nature of such fisheries.”—These certainly were great inconveniences: and it is wonderful that during a space of eleven years no remedy had been applied to them.

At the end of this period, the act before us provides a remedy. It extends and describes the boundaries of the provinces, including within those boundaries the colonies, and back settlements, for which no civil government had been provided by the proclamation; and the Labrador coast, which by that proclamation had been affected to the government of Newfoundland; providing at the same time, by a clause, which seems to contradict the description itself, that nothing

herein contained "shall in *any wise* affect  
"the boundaries of any other colony."—  
Saving likewise all rights derived from  
preceding grants and conveyances.

Having thus fixed, if indeed the act  
can be said to have fixed, what are the  
territories and people, whom the legisla-  
ture has in contemplation, the act goes on  
to appoint the civil government of the  
province. For this purpose it first repeals  
all the provisions made by the proclama-  
tion cited above, so far as it relates to the  
province of Quebec, or to the commission,  
under the authority of which the govern-  
ment of the province had been hitherto  
administered; it repeals all the ordinances  
hitherto made by the governor and coun-  
cil, relative to the civil government, and  
all commissions granted to judges and  
other officers.

All these provisions are repealed, because  
as it is declared, "they are inapplicable  
"to the state and circumstances of the  
"province." Two grounds are assigned  
for

for this severe censure on the king's proclamation. The one "that the inhabitants of this province did, at the time of its being conquered, amount to above sixty-five thousand persons professing the religion of the church of Rome:"—the other, "that they did then enjoy an established form of constitution, and system of laws, by which their persons and property had been protected, governed, and ordered for a long series of years."

Combining the censure on the royal proclamation, and the grounds assigned for it together, we must conclude, that the proclamation was looked upon as faulty, in not having sufficiently provided for the security of the inhabitants who professed the Roman catholic religion; and in having wantonly, and without reason, broken in upon the ancient system of laws. And these are the faults which the act endeavours to rectify.

It provides that his majesty's subjects, professing the religion "of the church of  
"Rome,

“Rome, of, and in the said province of  
 “Quebec\*, may have, hold, and enjoy,  
 “the free exercise of the religion of the  
 “church of Rome, subject to the king’s  
 “supremacy, declared, and established, by  
 “an act made in the first year of the  
 “reign of queen Elizabeth over all the  
 “countries which then did, or hereafter  
 “should belong † to the imperial crown of  
 “this realm.” The clergy of the church  
 of Rome are confirmed in the enjoyment  
 of their accustomed dues and rights, with  
 respect to such *persons only*, as shall pro-  
 fess the said religion. Out of the rest of  
 such accustomed dues and rights, his ma-  
 jesty is empowered to make such provision  
 as he shall think expedient for the encou-

\* Such is the uncouth phraseology of the act;  
 so that one might be tempted to imagine the reli-  
 gion of the church of Rome was one thing at  
 Quebec, and a different thing elsewhere.

† The words “*hereafter shall be*,” occur in the  
 xvi. sect. of the act of Elizabeth; the intent of which  
 is to “extinguish” all foreign power in countries  
 within the dominion of England; but are dropt in the  
 xix. sect. which imposes the oath of supremacy.

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agement of the protestant religion, and the maintenance of a protestant clergy. Such of the inhabitants as adhere to the Romish church, are neither to take the oath prescribed by the statute of Elizabeth, nor any oath hitherto substituted for it; but another oath is prescribed in this act. Those who refuse or neglect to take this oath, are made liable to the same penalties as by the act of Elizabeth would have been incurred for refusing to take the oath prescribed in that act.

The act then goes on to secure his majesty's Canadian subjects in Quebec ("the  
" religious orders and communities only  
" excepted) in all their properties and possessions, together with all the customs  
" and usages relative thereto, and all other  
" their civil rights, in as large, ample,  
" and beneficial a manner, as if the said  
" proclamation, commissions, ordinances,  
" and other acts and instruments had not  
" been made, and as may consist with  
" with their allegiance to his majesty, and  
" subjection

"subjection to the king and *parliament* of  
"Great Britain."

It ordains that all controversies relative to property and civil right, shall be decided by the laws and customs of Canada, till altered by any ordinance of the governor, with the advice and consent of the legislative council.

To this clause two provisos are annexed. The one, that it shall not extend to any lands which already are, or hereafter may be granted by the king in free and common soccage. The other, that it shall not preclude any person who has a right to alienate his lands, goods, or credits, in his life time, by deed of sale or gift, or otherwise, from devising, or bequeathing them at his death by his last will or testament.

The act then remarks, that the certainty and lenity of the *criminal* law of England, and the benefits and advantages resulting from the use of it, had been sensibly felt by the inhabitants from an experience



Sect. VIII. TO THE COLONIES. 445

perience of more than nine years, during which it had been uniformly administered; and therefore enacts, that the same law shall continue to be administered, and observed, as well in the description and quality of the offence, as in the method of prosecution and trial; and the punishments and forfeitures thereby inflicted to the exclusion of every other rule of criminal law, subject nevertheless to such *alterations* and *amendments* as the governor, with the advice and consent of the legislative council, shall from time to time cause to be made therein.

So much power is left to this legislative council, that great part of the merit, or demerit of this act, will depend on the constitution given by it to this body.

The act acknowledges, that the power of making many regulations for the future welfare and good government of the province, must of necessity be intrusted for a *certain* time—(and it might have been said at *all* times) and under proper restrictions,

to persons resident there: it declares it to be at *present* (though it does not say why, nor therefore give any *datum*, by which it may be conjectured *when* it will be less) inexpedient to call an assembly;—and it therefore empowers his majesty, by warrant under his sign manual, with the advice of his privy council, to constitute the council in question under the description of—a council for the affairs of the province;—to consist of such persons *resident* there, not more than twenty-three, nor fewer than seventeen, as his majesty shall appoint; which council thus appointed, or the major part thereof, with the consent of the governor, are to make laws “for the peace, welfare, and good government of the province.”

From the general power of legislation thus given, that of taxation, however, stands excepted, unless it be with respect to such rates and taxes as the inhabitants of any town or district, may be authorized by the council to levy, and apply within

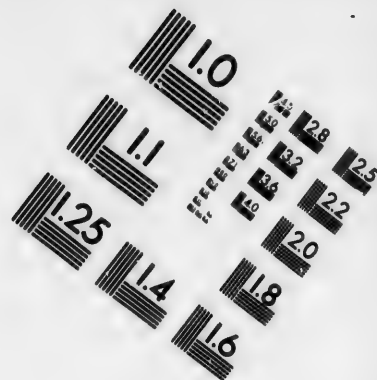
Sect. VIII. TO THE COLONIES. 447

the said town or district for *making roads*, erecting, or repairing, public buildings, or for any other purpose respecting the local convenience and œconomy of such town or district.

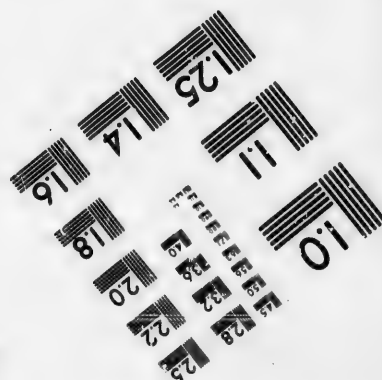
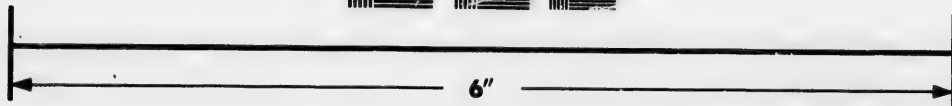
All ordinances to be made by this council are to be transmitted to his majesty, within six months, for the royal assent. Nor is any ordinance touching religion, or any ordinance inflicting a greater punishment than fine, or imprisonment for three months, to be of any validity, till such consent is obtained. No ordinance can be passed at any meeting of the council, where less than a majority of the whole council is present; nor at any time, except between the first of January, and the first of May, unless on *urgent* occasions: on which occasions the governor is to summon every member resident at Quebec, or within fifty miles of it.

There is one circumstance which must strike every man who reads this act. It is acknowledged over and over again in it, that





Resolution test chart showing patterns of vertical and horizontal lines with numerical values ranging from 1.0 to 2.5.



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that the proclamation published in the third year of his majesty's reign, was inapplicable to the state of the province. Is it possible that parliament should have sat six long years before it made this discovery? The confusion which prevailed in the rest of the American continent was attributed by those who were best informed, to the want of a parliamentary settlement. Why was the settlement of Quebec so long delayed? The laws and customs, the temper and manners, of the people, must surely have been learned by the ministry in the course of five years, which preceded the existence of the last parliament. It cannot then but appear singular, that an act of this nature should have been deferred to the very latter end of the last sessions of the parliament before us. It was surely an act of wanton cruelty to suffer the province to groan for six whole years under a form of government, "inconsistent with their commercial interests, and inapplicable to  
 "the

"the state and circumstances of the country."

To atone for this, I must call it culpable negligence, we may with reason expect, that the regulation which so much time was taken to digest, was well adapted to the state and circumstances, and conducive to *all* the interests of the province. We have the more reason to expect this, as here at least parliament had it's hands at liberty. No contending and opposite claims had it to adjust, no grants to steer clear of, or revoke.

All the peculiar privileges which the inhabitants of Quebec could claim, were comprised in a short capitulation, and a single article of a treaty of peace.

Let us see now if the justice and policy of the act are such, as to atone for the astonishing tardiness in passing it.

With regard to the extension of the boundaries of the province, I think all the objections against it, have been fully and ably answered by an author, who seems to

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have



have written upon full information, and a thorough knowledge of the subject\*.

But the loudest clamours have been raised against other parts of this act. Religious prejudices are, of all, the strongest and most likely to work upon the minds of the people. This topic was, therefore, greedily seized by opposition. The horrid crime, and the dreadful danger of establishing popery in so large a part of his majesty's dominions, has been thundered in the ears of the king, lords, and commons in remonstrances from very *religious* magistrates, and echoed back again to the public with all the clamour and turbulence of an enraged and misguided populace. Meantime the defenders of the bill seemed afraid of speaking out. They were willing to allow any thing, to have re-

\* See this part of the bill ably defended by the author of "the Appeal to the Public, stating and considering the Objections to the Queen's bill," printed for Payne, 1774, from page 36 to the end.

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course to any subterfuge, rather than confess that the Romish religion was *established* by this act.—It is tolerated they said, but not *established*.—Nay one writer found out, that the church of *England* was established by it. “For the Canadians (says he) are to acknowledge the king to be “supreme head of the church in *Quebec*, “by the authority of the act of *Elizabeth*: “of whatever *church*, then the first of *Elizabeth* declares the king to be supreme “head, *that* must be the church established “in *Quebec* by this act \*.”

If this gentleman had turned to the act of *Elizabeth*, he would have found that it does not declare the queen to be the head of any particular church. He might have recollected too, that what is now called the church of *England*, did not then exist.

The act of uniformity was not passed; the queen is simply declared “su-

\* See Justice and Policy of this Act asserted and proved, p. 50.

"preme governor of these realms, as well in matters ecclesiastical as civil." A very different thing from being head of this or that particular church. By virtue of this act, I suppose, the king is head of the churches of the anabaptists and presbyterians, and of our sober honest friends; the Quakers, as well as of the church of England. This author indeed does allow—"that the point might have been made more clear". Ask him why it was not,—and he gravely tells you; "then there would have been danger of *undoing* what the clause sets out with the professed purpose of doing,—the giving *ease* and *security* to the minds of the Canadians \*". How the Canadians would start and shrink at such a plea as this!—"You set out (they would say) with professing to establish *our* church; and lo! by an ungenerous suba-

\* See Justice and Policy of this Act asserted and proved, p. 51.

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“terfuge, it is the church of England you  
“mean all the time to establish.”—

If the acts of the legislature are to be defended, let it not by arguments like these.  
—To utter *dark sayings*; to speak unintelligibly, would be disgraceful enough to a legislature; but to speak deceitful words, to use words which have two meanings, with the professed purpose of deceiving;—for that I cannot find a name. No! let us speak out, let us boldly acknowledge the truth:—the act *has established* the religion of Rome at Québec. Why torture ourselves to explain away a truth that is so clear? or why hesitate to acknowledge a fact, that needs no apology? If there be any force in treaties; if any faith is due to them; if they can convey a right; the Canadians had a *right* to this establishment.

By the 27th article of the capitulation between general Amherst and the marquis de Vaudrucil, it is stipulated, that “the

“ free exercise of the Roman religion shall  
“ subsist intire, in such manner, that all  
“ the states and people, of the towns and  
“ countries, places, and distant posts, shall  
“ continue to assemble in the churches,  
“ and to frequent the sacraments as here-  
“ tofore, without being molested in any  
“ manner, directly or indirectly.” In the  
second article of the definitive treaty of  
Paris, “ his Britannic majesty agrees to  
“ grant to the inhabitants of Canada the  
“ liberty of the Catholic religion;” and  
engages “ to give the most exact and most  
“ effectual orders, that his new Roman  
“ Catholic subjects may profess the wor-  
“ ship of their religion, according to the  
“ rites of the Romish church, as far as the  
“ laws of Great Britain permit.”—Now  
surely the laws of Great Britain permit  
him, with the advice and consent of his  
parliament, to secure to his Canadian sub-  
jects every thing that the capitulation had  
granted them. To interpret the last un-  
necessary

necessary clause, so as to annul the tenor and purport of the whole, might be received as a legitimate mode of interpretation in the schools of Berlin or Vienna; but I hope it is a mode that will never be adopted in England. By the terms of capitulation, by the plain meaning of the treaty, the Canadians had a right to an establishment.—The Roman Catholics in Quebec are, as to this point, in the same situation as the Protestant dissenters in England. The capitulation, and the treaty, operate with respect to the one, just as the toleration act operates with respect to the other. In truth, it was *they* that rendered that which “in British subjects would have been illegal without them, thenceforth legal; by them this way of worship was permitted and allowed: it was not only exempted from punishment, but rendered innocent and lawful.” In a word, as lord Mansfield nobly declared of the way of worship of the dissenters,—“It was

"established\*." And what has the act done more, than barely confirm what the capitulation and treaty had solemnly granted before?

But it is said the Roman religion is not only *established*, it is even endowed, by this act. True, it is so. And to some endowment too the Canadians had a right by the same capitulation. In the article already cited, it was "demanded, that the people should be obliged by the English government to pay to the priests the tythes, and all the taxes they were used to pay under the government of the most christian king." The general's answer was, "That the obligation of paying the tythes to the priests, must depend on the king's pleasure." After the place had surrendered, the king's pleasure

\* See lord Mansfield's speech in the House of Lords, in the case of the chamberlain of London, against Allen Evans, Esq. printed at the end of Dr. Furneaux's Letters to Mr. Justice Blackstone. a speech which is more worth than whole volumes of Commentaries.

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could be declared only in parliament ; and this act is that parliamentary declaration of his pleasure. The moment the exercise of their religion was granted to the Canadians, the maintenance of their priests in some way or other, became necessary ; the king, that is, the king in parliament, was to exercise his judgment as to the mode and measure of maintenance to be assigned : he has exercised it, and the result is, that he has fixed upon that measure and that mode, to which they, who are to furnish the maintenance, had for ages been accustomed, with which they were contented ; which they themselves entreated to be continued.

What sounder principles of justice or policy could have been adopted ? Had the other provisions in the act been as unexceptionable as this, I know of few acts that would lie open to less objection ;—but those who are best acquainted with the nature and genius of the Romish religion, will allow, that the act has not sufficiently provided



provided against the dangers with which that sect is always threatening the peace of the community. It is not the dogmas of the church of Rome which should alarm the legislator. What is it to him whether men believe in the absurd doctrine of transubstantiation, or the no less absurd doctrine of consubstantiation, which we all of us learn in our catechism? But there are other matters of a quite other importance. It is a matter of a quite other importance whether or no subjects acknowledge a dependence on a foreign power, inconsistent with the obedience to their natural sovereign; whether or no the priests enter into vows, or form societies incompatible with the welfare of the state. Against these inconveniencies, which affect the society in its civil capacity, the act has provided either none or inadequate checks.

It is indeed enacted, that the Canadians shall be subject to the king's supremacy as established by the first of Elizabeth, and an oath is prescribed to enforce

this provision. It has been said, that the bill as it came from the House of Lords, enjoined the Canadians to take the oath prescribed in the statute of Elizabeth. The lay lords perhaps did not know, that no true catholic could voluntarily swear "to renounce all foreign jurisdiction, power, and authority in matters ecclesiastical." The spiritual lords one would think could not but know it; and yet it would seem rather uncharitable to suppose, that they thought so ill of the Canadians, as to suspect them capable of giving their "unfeigned assent and consent," to an article which they disbelieved: be that as it may, the oath was changed in the lower house. As it now stands, it is a general oath of allegiance, without any particular reference to matters ecclesiastical; and so far it is right \*. But the fact is, that

*oaths*

\* I say *so far*, because I think the last clause injudicious, "renouncing all pardons and dispensations from any power or person whomso-

"ever

*oaths* are of no use, no validity in this case. The religious principle can never have force sufficient to bind a firm believer in the plenitude of power in the *infallible* to any act, by which that plenitude of power is acknowledged to be circumscribable.

Here then the act should have been more explicit; it should plainly have defined what was meant by the king's supremacy. It should have prohibited all appeals to the court of Rome in any cause or on any pretence whatever: it should have established courts for the decision of

"ever to the contrary." The member who brought in this oath must, one should think, have known, that whoever was staunch papist enough to believe the pope has the power of dispensing with obedience to the *oath*, must believe too, that he had power enough to dispense with the *renunciation*. And it seems, therefore, injudicious in the legislature, to let the Canadians see, that it even supposed it possible they should be capable of holding a tenet which would destroy the sanction of all oaths. If, indeed, the sanction of an oath be of that use it is generally supposed to be.

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all ecclesiastical causes, which, like all our other courts, should have sat and acted in the name, and by the authority of the king. It should have guarded these provisions by pains and penalties clearly expressed, and easy to be inflicted. As the act now stands, how is the Canadian to know what is the supremacy to which he is subject, or what are the penalties under which he is to submit to it? He is to find it out, if he can, in the first of Elizabeth, a statute which is a repeal, or a revivor of no less than sixteen other statutes, which itself has been altered, and in part repealed by eight or ten later statutes. A statute, therefore, which we may venture to say, not one Englishman in a thousand understands, which, therefore, it cannot be reasonable to expect the Canadians should ever understand.

The celibacy of the Roman clergy is another point, in which the welfare of the civil society is more deeply interested than many may at first sight imagine.

Men

Men who are debarred from being husbands or fathers, have not the same motives to be good citizens as the rest of mankind; they cannot give the same pledges to society for their good conduct in it. The spirit of the citizen is absorbed, "*dans l'esprit du corps.*" "But what, we shall be asked, would you have the clergy constrained to marry?" No, surely. Nay, it was better perhaps not to give them permission to marry in express and direct terms. But something might have been done; the courts might have been prohibited from holding, and the parties from prosecuting any plea against priests who should marry. If the act had removed all legal restraints, the rest might have been left to nature.

In the capitulation \* it is stipulated, that "the communities of nuns shall be preserved in their constitution and privileges; that they shall continue to ob-

\* ART. XXXII.

"serve

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"serve their rules, and to be exempted  
"from lodging any military: that it shall  
"be forbid to trouble them in their reli-  
"gious exercise, or to enter their monas-  
"teries."

The same privileges were demanded\*,  
but refused, "with regard to the com-  
"munities of Jesuits and Recolets, and  
"of the house of the priests of St. Sul-  
"pice†. Yet the communities and all the  
"priests are to preserve their moveables,  
"and the property and revenues of the  
"signories, and other estates which they  
"possess in the colony; and the same  
"estates are to be preserved in their pri-  
"vileges, rights, honours, and exemp-  
"tions." In the definitive treaty of peace  
not a syllable is said about these articles.

Here then a question may arise, whether  
the grants made in a capitulation are to  
be considered as *perpetually* binding, or

\* ART. XXXII.      † ART. XXXIV.

only in force *till* the definitive treaty be signed, and to lose all farther validity unless confirmed there, either by express or general terms?

This latter seems to have been the idea adopted by parliament; for, notwithstanding the XXXIVth article of the capitulation, recited above, the religious orders and communities are excepted from the number of those, who are to hold their property and possessions, with all the customs and usages relative thereto. Now if grants conveyed by a capitulation of themselves, and without any subsequent confirmation by the definitive treaty, be of permanent validity, then it should seem that parliament did an act of injustice to the religious orders in not confirming them in all their possessions and rights. If, on the other hand, the grants made by a capitulation be only temporary grants, and lose all subsequent validity, unless confirmed by the definitive treaty, then it will be difficult to vindicate the prudence

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of parliament for stopping short where it did, and neglecting to pave the way for a certain and total dissolution of these orders.

We have seen princes of the Romish sect, the most *faithful* king, the catholic king, with even the eldest son of the church, unite in *forcing* their spiritual parent to suppress one religious order: other catholic princes have, by their own authority, suppressed other orders in their own dominions. Why a protestant sovereign should be more scrupulous on this head, I own does not readily appear.

Heaven forbid we should imitate the circumstances of cruelty and injustice which attended the suppression of the Jesuits. But surely parliament might have prohibited these orders from receiving any more novices; have obliged them to give in an exact account of their estates, have divided these estates into certain portions, have assigned a competent portion to each of the present members; and as

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they



they died off, it might have appropriated their respective shares to the building and endowing of schools, to the making of roads, to the maintenance of a protestant clergy, and to other works of public utility.

It may be urged perhaps, that such an arrangement would have shocked or revolted the Canadians; but is there any thing more shocking, or revolting, than the cruel state of dependence in which the act has now left them? they are mere tenants at will: was that then the intentions of parliament? Did it mean that these communities, men who have such an influence over the minds of the people should be kept dependent on the will of the crown for their lands and possessions?

The gradual suppression of convents would have furnished a sufficient provision for a protestant clergy. The protestant laity might then have been finally exempted from the payments accustomed

to

to be made to the Romish clergy; and thus without any new expence to the state, might have been held forth a powerful and ever operating inducement to abandon the church of Rome. As the act now stands, this inducement is withdrawn; catholics are to pay the accustomed dues and rights to the catholic priests; but protestants too are to pay them to some collector or other, and out of them his majesty may, if he pleases, make a provision for a protestant clergy. If his majesty is to *apply*, he is then to receive these rights and dues from his protestant subjects.

Did the framers of this act consider, that a part of these rights and dues arises from sums paid in commutation for penance, for masses said for the delivery of souls from purgatory, for dispensations for breaches of the canon law? Commutations and dispensations are indeed personal affairs, and when a man withdraws from the society where only they are current, I suppose he may do without them. But

the sums to be paid for the release of our ancestors from purgatory are debts of another sort; the whole of a man's estate is chargeable with them. These then are to be carried to his majesty's account. Tythes too are to be carried to his account. Are the sums arising from them to go with the other unappropriated sums and swell the civil list? or are they to be brought into the exchequer and accounted for to parliament? It would be an amusing item to read in some treasury account, "Cash from a noble Canadian for one thousand masses which should have been said for his grandfather's soul. Ditto for the soul of his grandmother, &c."

Thus much for the tenderness shewn by this act to the religious rights of the Canadians. With regard to their civil rights it is enacted, "that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada."

No

No man can judge of the propriety or impropriety of this clause, who is not thoroughly master of the state of the country, and the temper and disposition of the inhabitants. It is always difficult, and often dangerous, to transplant in an instant a system of laws established in one country by the progressive experience of ages, and to impose it on another country, where neither the customs nor prejudices, nor habits of thinking have paved the way for its reception.

Whether, during the many years we had been in possession of Canada, the minds of the people had been prepared for the reception of the English law, is a point on which parliament could reason but imperfectly for want of sufficient data to go upon. Reports from the board of trade on the state of the province, representations from men in the highest offices in it, with plans for the form of government which was best adapted to it,

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opinions

opinions on these plans from the law officers at home, and many other important papers had been laid before the council board; they were called for by one at least of the two houses, but not produced, because it should seem there was not time to *copy* them; a reason which must appear singular at the end of so many years. Nor is this all, many competent witnesses were with-held from examination for no apparent reason at all; and one witness, high in office, was suffered to insult the house by answers, that would not, under the same circumstance, have been endured at the bar of an inferior court\*.

Thus

\* I do not by this mean any reflection on Dr. Marriot; it was not he who insulted the house; the insult comes properly speaking, from another quarter, he was only the conveyance by which it was offered. The reasons alledged why the papers demanded could not be laid before the house, were these: that the papers were not copied; that the copying of them would be a work of time, and create long delays, and, that the *same* information might

Thus much however may be gathered even from the imperfect account we have of the debates, that the defenders of this clause seem to have confounded two things perfectly distinct and independent; the laws relating to succession, and the transfer of the laws relating to judicial proceedings. It might have been very cruel, and very impolitic to have changed the one, and yet, at the same time, very benevolent, and very politic to have changed the other. The establishment of a trial by jury in civil causes would surely have made no change in the laws of succession; a jury may try a right to lands in common soccage, or to lands in gavel kind; a jury is as competent to the trial in one case as in the other; a jury does not create, it only find a title,

might be had from living witnesses. In consequence of this idea, Dr. Marriot was summoned, and, under these circumstances, it was certainly to insult the house, to bring him to the bar without a full permission to lay his opinion before the house.

We may observe too, that of the arguments urged against the trial by jury in civil cases, some went directly in favour of that mode; others proved, not that the Canadians disliked a jury, but that they wished to make a real improvement in it. For it was said by one witness, that the reason why the Canadians disliked a jury in civil causes was, that they did not think their property so safe in the determination of taylor and shoemakers, mixed with people in trade, as in that of the judges. Now this objection was evidently dictated by the pride of *noblesse*; a French gentleman finds himself humbled by seeing a *roturier* put on a par with his dignity. If the institution of juries would tend to check this pride, so inconsistent with the spirit of freedom, that very circumstance is the strongest argument why juries should be permitted in civil causes. If the gentleman thinks his property safe in the hands of the judges, because they are nearer his rank, the plebeian will think his

his property securer in the determination of a jury, for they are nearer *his* rank. Now the law which best secures the property of the greatest number, is surely the best law. The law which gives the greatest accession of security, where there is naturally the greatest weakness, is surely the best law.

It was urged too, that the Canadians did not wish for an English jury; for they neither doated on the number twelve, nor expected a jury to be what many think in their conscience they seldom are, though they must pretend to be, unanimous. They therefore wished their juries to consist of uneven numbers, and the decisions to be collected from a plurality of voices. This surely did not prove their dislike to juries; it proved only, that they had seen a defect in the constitution of our juries, to which habit and custom has blinded us, and that they wished to have a remedy for that defect. Instead of refusing them a jury on this account, some have thought it



it would have been wiser, and better to have modelled our own juries in the plan they held out to us.

Another very strong objection was urged against this general extension of the laws and customs of Canada in all matters relative to property and civil *rights* \*. By the laws and customs of Canada, the governor was intrusted with blank lettres de cachet, which he might fill up at his discretion, and commit the party, whose name he inserted, to prison during pleasure. By this clause of the act then a king of England may give blank lettres de cachet to his governor, and his governor may make the same use of them; for if his majesty's Canadian subjects are to be governed by the ancient laws and customs

\* See the examination of Mr. Maseres in the Parliamentary Debates, Vol. IX. p. 317, &c.— Though this book is of no authority, and in many places faulty, yet the accounts of this, and some other examinations, seemed to be pretty accurately taken.

of Canada: if this mode of issuing lettres de cachet be among those ancient laws and customs, how can it be proved illegal in the king to issue them, or in the governor to apply them? Or what punishment can you inflict on the minister who should advise the king to exercise, or on the governor who should actually exercise, a power which parliament thus declares to be legal? Or what remedy could a subject, injured by a wanton exercise of that power, obtain in the courts of Canada? Personal liberty is a *civil* right.—The laws of Canada are to provide the remedy against a civil wrong. If they give no remedy, no remedy is to be had. And it is, I suppose, out of doubt, that the laws of Canada provided no remedy against this abuse of power in a governor.

It was therefore insinuated by the very respectable witness, who during the course of his examination urged these arguments, that a clause should be inserted granting the benefit of the Habeas Corpus Act to his

his majesty's subjects in Canada. The clause however was *not* inserted, because it was said, that it was not probable that lettres de cachet should ever be made use of. A reason, which if it has any weight, would operate to the tearing up all the fences set about our liberty\*.

The introduction, or rather confirmation of the criminal law of England, is certainly one of the most laudable parts of the act; the reasons assigned for it are such as do honour to the legislature; but there is an inaccuracy, shall I call it, or a fallacy, which perhaps escaped the legisla-

\* In criminal prosecutions, I take it for granted the Canadians are entitled to the benefit of this act: but this does not justify the author of the Appeal in calling "arguments issuing from the idea of the non-extension of the writ of Habeas Corpus, mere moonshine," p. 34. He is wonderfully mistaken when he supposes, that "the liberty of the subject" is not concerned in civil actions. Or that in civil actions "the crown may not gain an opportunity of interfering to the oppression of the subject." Ibid, p. 33.

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ture itself. What are exclusively the objects of the criminal law in England? —This question perhaps did not occur to the framers of the act; if it had, I persuade myself the benefits intended by this provision would have been better secured than they are. All crimes are objects of the criminal law. So it may be said,—but what are crimes in the eye of the law? —Many actions may be considered, at the option of the plaintiff, as public or as private wrongs, as crimes or as civil injuries. The same actions therefore may be proceeded against in different courts, be tried by different laws, just as he pleases; so that the provision shrinks to this. If you prosecute another criminally, you shall do it in the method prescribed by the criminal law of England. As “to the description and quality of the offence,” the English law is no farther a rule than as it may be alledged to prevent a greater degree of criminality being attributed to any act, for which a man is proceeded against criminally,

criminally, than the criminal law of England attributes to it. Manslaughter, for instance, shall not be called murder, nor shall misprision of treason swell into treason.

But to have made this clause as beneficial to the subject as it seems probable the legislature intended to make it, the act should have defined what actions were to be considered as *private*, what as *public* wrongs; but no such definition is there. See, therefore, how the case stands now: a Canadian noble takes it into his head to attempt to seduce the wife, or the daughter of a peasant, the peasant comes in, hears the persuasive tongue urging his wife or daughter to dishonour; fired with resentment, he bestows on the culprit the chastisement he deserves. What is the noble to do? If he indicts him for an assault, such is the lenity of the English law, such are the prejudices of a jury, that the man will be let off without any punishment, or at most for a trifling fine, or a short imprisonment.

prisonment. The noble feels that his dignity will be safer in the hands of a Canadian judge, than of a plebeian jury; he, therefore, rejects the mode of indictment as for a public wrong, and brings an action as for a civil injury. An Englishman takes it in his head to write against one of the legislative council that undefinable thing called a *libel*. If the Englishman be indicted for a crime, a jury may perhaps find the supposed libel to be no libel; or at worst will send him for a short time to prison. No, says the counsellor, this Canaille of a jury have not the fine feelings of honour.—I will sue the man for damages: that way I can throw him into prison for life.

But the most exceptionable part of the act, that which I conceive it impossible to defend, that which destroys, or at least may be used to destroy, all the beneficial provisions which precede it, is the constitution of the legislative council.

The majority of seventeen men, in whom no earthly qualification is required, but that they be resident in the province of Quebec; who, for ought appears by this act, may be men of no property, no principles, no knowledge; to be named by the crown, removeable by the crown, are intrusted with the important business "of making ordinances for the peace, welfare, and good government of the province."—

The restrictions, under which they are to exercise this extensive authority, and which the act calls "proper restrictions," are only these: they cannot impose taxes, except for local oeconomic purposes: they must transmit their ordinances for the approbation of the king in council: they cannot indeed during the interval between the time of transmitting them, and that of their receiving the royal assent, enforce any ordinance which inflicts a higher penalty than a *fine*, or imprisonment for three months: but the fine is unlimited;

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so that they may pass ordinances which may effectually ruin every man who is obnoxious to them.

And to every other purpose this very respectable council has an absolute power. It has the power of altering, under pretence of amending, the civil law: it has the power of altering, under the pretence of amending, the criminal law. The amendment of the civil law was an undertaking beyond the reach of the wisdom of a British parliament; but is only a competent object of these heaven-born legislators. The communication of the criminal law of England was from experience, found to be very beneficial and advantageous: why then should the power of *amending* it be intrusted to such a body as this? A reason has been suggested, which I would not suppose to be the true one, though I may venture to repeat it: should a man (it is said) be obnoxious to his excellency the governor, he has only to summon his devoted council of nine (for a majority of this



majority is a competent number); a new mode of procedure, a new form of trial will be appointed, by way of "alteration and amendment;" and the culprit will hear no more of the certainty, and lenity, of the criminal law of England.

Such then is the tenure by which the Canadians hold the blessing conveyed to them by this act. If the whole province does but furnish nine men of bad principles—and where is the province that will not?—the governor has only to recommend them to the crown as fit persons to be of the legislative council, and the Canadians may be legally stripped of every right, every blessing they enjoy. Ten men would have saved the city with the odious name: nine only are enough to damn Quebec.

PLAN

## P L A N

O F

## RECONCILIATION.

**G**REAT outcries have been raised against the tyranny and violence with which the last parliament is alledged to have proceeded against the Americans. The very reverse appears to have been the case; for six whole sessions they slept over the business; it was not till the last sessions that they awoke. If, when roused at last from that long lethargy, they did less, or acquitted themselves worse than they might have done, no small share of blame perhaps is due to that party which exerted all its force in obstructing what was proposed, without offering any thing of its own.

The truth seems to be, that parliament is more to be blamed for what it left *undone*, than for what it did; for having left things at the end of near seven years

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in the very same unsettled state in which it found them, rather than for having done what is scarce possible, put them into a worse.

A proposition once avowed by a quondam house of commons is, "that it is a very unsafe thing, in any settled government, to argue the reasons of the fundamental constitutions, for that can tend to nothing that is profitable to the whole \*."

A maxim of the very stamp of those, behind which all bigots either in religion or politics intrench themselves; as if a government could be said to be settled, or at least well settled, that could not bear to have the reasons of its establishments enquired into. One cannot but be sorry at observing a parliament in this more enlightened age actuated by the same fear of

\* See Com. Journ. vol. ix. p. 243.

weaken-

weakening the fundamentals, if they endeavoured to explain them.

It appeared by all the proceedings of the Americans, by the votes of their assemblies, by the books in greatest repute among them, that the Americans had no precise ideas of the relation in which they stand to the mother country. These accounts were confirmed by repeated advices from the servants of the crown ; yet till that relation was fixed, nothing permanent could be done. Instead of setting about this business, what was the parliament employed about for six long years ? They were at the pains of giving their sanction to a power, which by their own shewing needed no such thing, and which after it had that sanction, it was thought, and that without any change of circumstances, not safe, or not prudent to exert. To threaten a punishment, and that of the first magnitude, which you dare not inflict, is wanting only to grasp all the

odium of severity, without one of its advantages.

At the time these impracticable threats were thrown out, assurances of concessions in some points were given in a manner, that even a less haughty people might have attributed to fear. Concessions were actually made, by which the greater part of the profits of the obnoxious measures were abandoned, at the same time that all the odium of them was retained. A redress of grievances was promised, which, when the time came, they could not bear to look into: parliament seeming all along as much afraid of entering into the question of American grievances, or of its own rights, as a zealous catholic is afraid of examining the foundation of the power of the church. What was the consequence? Whilst parliament was so cautious of reasoning about fundamental constitutions, the Americans reasoned so long, and so wildly, that at length they found out, there

there were no common fundamentals between us at all; and as parliament had crudely asserted its own supreme power over the colonies in all cases, they came at last as fully and flatly to deny it\*.

Then it was indeed that parliament awoke, and for a time put on the appearance at least of vigour. But from the review we have taken of the acts of this last session of it, two only appear to have been intended as parts of a regular plan, or permanent system; the other two are mere temporary expedients, set on foot upon the spur of necessity, to check rather than remedy sudden and unexpected evils.

In neither of these temporary laws however, does it appear that parliament has exerted any unconstitutional powers. The laws indeed have been branded with every ignominious title, but surely they are fully justified by the mischiefs that called

\* See Tucker's Fifth Tract, p. 47.

for them ; mischiefs, if not created, yet most certainly precipitated by the very men who clamoured against the remedies.

As to the two permanent laws, we may upon the whole perhaps, in some measure excuse, but we cannot praise them : they might be, we must suppose they were well meant ; but that is their chief merit. To the deep policy, to the comprehensive wisdom of an enlightened legislature, their pretences surely are but slender.

“ *C'est une chose bien facile* (says some “ one) *que d'être sage après coup.*” And no doubt when a plan has been tried, and has miscarried, it is easy to deceive ourselves, and to imagine we should have *foreseen* the inconveniencies which the experiment only has discovered ; yet in this case it does appear, that the scheme of parliament was defective. To repeal a part of an uncommercial regulation, upon motives professedly commercial, and yet to retain the obnoxious principle, without any qualification whatever, could  
never

never lay the foundation of a regular permanent system.

The foundation of such a system could be laid only in a bill of American rights.

This bill should have asserted the supremacy of the British parliament, and its power to make laws binding over the colonies—not in the style of the Rockingham act, “in all cases whatever.”—This the colonies derided at the time as a mere *brutum fulmen*, and have since declared to be unconstitutional. But in all cases, except taxation, absolutely and unconditionally.

With respect to taxation, it had been urged in the last parliament on behalf of the Americans, “that parliament had no right to lay *internal* taxes on them, because they have no representatives in parliament; but that it had a right to impose port duties, or *external* taxes, because such duties are for the regulation of trade.” The difference between taxes external and internal was, at the same



same time declared to be this, that the direct object of the former class was to regulate trade, and that any revenue arising therefrom was incidental; that the professed object of the other was to raise a revenue, and the regulation of trade served only as the mode of getting at the revenue.

The Americans admitted the distinction, and hence concluded, that *port* duties imposed for the raising of a revenue were *internal* taxes: that port duties, the produce of which was to be paid into the exchequer, were imposed for the purpose of raising a revenue. The produce of all port duties in America, they added, was ordered to be paid into the exchequer, therefore all port duties were internal taxes\*.

Nay, they went farther; if instead of imposing port duties, another mode of taxation had been adopted; if the duties

\* See Bernard's Letters, p. 55. 56.

had

had been made payable on the exportation of the commodities from England, and not on their importation into America, they declared it would be all one : this mode they declared would be equally burthensome on their purses, and equally destructive of their rights \*.

In these arguments, allowing them their utmost force, there was nothing from whence it could fairly be inferred that the Americans ought not to be taxed at all, nor even that parliament ought not to have taxed them. All that could be inferred was, that, previously to their being taxed, they ought to be put on an equal footing in this respect with the other subjects of the empire, either by being permitted to send representatives, or if that be not practicable, by some other mode.

Here then the proposed bill of rights should have respected their opinions, and

\* See Farmer's Letters, p. 19.

should

should have put them on the same footing as the other subjects of the empire.

There were two modes of doing this; the most obvious and natural, and which to a man deeply learned in American affairs\*, seems to have appeared preferable to any other that can be proposed, is that just mentioned. An objection indeed has been made to it on account of the number which the house must then consist of, in order for that of the new members to bear a due proportion to that of the old. But that proportion need not have been large, if the idea of a representative were taken from the description of his function, given in an ancient statute, the Durham act, in which he is described as a "man sent to represent the condition of the country." This function, a number comparatively small would have been sufficient to discharge, nor need it mount by any means to Dr. Tucker's "goodly number of

\* See Governor Bernard's Letters, passim.

"two thousand seven hundred and ninety;" an assembly whereof "the decency, order, wisdom, and gravity," appeared so tempting an object of ridicule to the worthy dean \*.

If this plan, from local circumstances, or from mutual disinclination had been found inadmissible, there seemed yet another, which substituted in the room of the former, or combined with it, might have compassed the end in view.

If the Americans could not, or would not send representatives to the British parliament, and yet if the good of the whole empire required that parliament should assess the portion they were to pay of the public expence, such a mode might have been prescribed to the exercise of this right, as would have secured in the article of taxes, *all* the beneficial purposes of representation. Parliament, though it should be thought not to have

\* See his Four Tracts, p. 107.

found,

found, might, however, have created the same relation between itself and the colonies, as between itself and the inhabitants of Great Britain.

To communicate, and for ever to secure to the Americans all the blessings of the British constitution, so far as their local circumstances would permit, the bill might have laid down certain fundamental rules, which should for ever be observed in the laying of imposts or duties.

These duties are laid either upon goods imported from America into Great Britain, or on goods exported from Great Britain to America, or on goods transported from one colony to another, or on goods exported or imported to or from places out of the king's dominions.

As to the first class of goods, those imported from America into Great Britain, parliament might have left itself at full liberty to impose what duties it pleased on the importation of them here in England. Whatever duties were thus imposed,

ed, would not have been imposed on the Americans who exported, but on the British subjects who consumed them.

As to the second class, namely, goods exported from Great Britain to America, the bill might have provided, that no other duty should be laid on goods of this class, than on the same goods consumed in Great Britain.

As to the third and fourth class, goods transported from one colony to another, and goods exported or imported to or from places out of the king's dominions; parliament must have reserved the full rights of imposing such duties as it saw fit, because that right is essential to the regulation of trade.

That these imposts however might not be called internal taxes, the bill might have provided, that the monies arising from these duties should not be paid into the exchequer *here*, but to treasurers to be appointed by the crown, and accountable to the provincial legis-

latures there; the sums to be by the same legislatures appropriated to the respective services of American government.

Out of these sums, and such *taxes* as the provincial legislatures should impose, an adequate provision should have been made for the administration of justice, and the support of civil government. Adequate and permanent salaries should have been fixed on the governors and judges, and such other officers appointed by the crown as have permanent salaries in England. The quantum of the salaries to have borne a certain proportion to the salaries paid to similar officers in England. Neither these, nor any other offices, to be given to non-residents.

These expences regard only their own internal government; but the colonies are to be considered yet in another light; as members of the empire.

Considering them in this light, they are benefited by the mission, and reception of foreign ministers; by the troops kept

up for the general defence, by the general fund of warlike stores, and, above all, by the navy. If they receive their share of the benefit arising from these establishments, it is but just they should pay their share of the expences that are to support them. Parliament therefore has the same right of demanding that the Americans should contribute their proportion, as that *we* should contribute ours.

The only difficulty here would have been, to prevent the parliament from *exceeding* that proportion. And surely this difficulty is not of such a nature but that it might have been surmounted. Any given tax or sum to be raised in England might have been taken as the standard. The land-tax would have been the properest standard, because that is a tax, in which of all others it is the most difficult for a minister to stretch beyond a certain point.

A certain proportion should have been fixed, so that when Great Britain raised



any given sum by a land-tax, the colonies should raise each a proportionate sum : the mode of levying this tax to be left entirely to the provincial legislatures ; the appropriation of it to be left to parliament.

By this mode the same relation would have been created between the house of commons, and the colonies, as between the house of commons and the inhabitants of Great Britain. The house of commons could not tax *them* any more than they can *us*, without at the same time taxing themselves.

The house of commons might with the same propriety have *given and granted* their money as they now do ours. Every man of landed estates in England would have been as strenuous a guardian of their properties as of his own. Both must have stood, or fallen together.

If at the beginning of the last parliament the matter of taxation had been fixed upon this footing—and surely this would have

have been a constitutional footing to have fixed it on—the recognition of the supreme authority of parliament in all other points, would have met with little difficulty.

The necessary alterations in their internal constitution, and in their commercial system, might then have been submitted to with less difficulty. At the same time, to put an end to that patch-work, which so disgraces our law in general: a total repeal of all the laws relating to the colonies might have been effected; and the thirteenth parliament might have had the glory of forming one comprehensive connected code, suited to the situation of things subsisting.

That we must either give up the colonies, or strike out some method of reconciling British superiority with American “liberty,” seems to be allowed on all hands. In the mean time those who tell us, that “both may yet be preserved;” who promise to make this “the great  
“object

"object of their care", have yet offered nothing consistent, nothing practicable: nothing beyond the plan which the colonies have already rejected as unconstitutional. In such a moment a man of far less abilities may be excused if he throws in his mite. The plan, of which a rude outline is here sketched out, appears to me at least to have been an eligible plan: indeed, for aught I can see, the only eligible one which the case admits of. I think it was not then, I hope it is not now impossible.

\* See Mr. Burke's Speech at Bristol after his Election.

#### END OF THE FIRST VOLUME.

Page 10, l. 4, for *Charles I.* read *James I.*—P. 117, l. 16, for *this tax*, read *there*.—P. 126, l. 16, for *independent*, read *dependent*.—P. 176, l. 16, for the word, read by the word, —P. 199, l. 27, for *considering*, read *consider*.—P. 313, l. 5, for *all points*, read *all other points*.—P. 326, l. 4, for *equal*, read *equally*.—P. 328, l. 9, for *be convicted*, read *be no conviction*.—P. 330, l. 16, for *by*, read *on*.—P. 37, l. 7, for *transfer of the laws*, read *transfer of property with the laws*.—P. 44, line last, for *wanting only*, read *wantonly*.

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